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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

DURING THE YEAR 1896.

REPORTED UNDER THE AUTHORITY OF

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OF THE

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DURING THE PERIOD OF THESE REPORTS.

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ONTARIO
APPEAL REPORTS.

WRIGHT v. HOLLINGSHEAD.

Execution—Exemptions—Chattel ordinarily used in the Debtor's Occupation.

Tools and implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used.

An execution creditor was held entitled, therefore, to garnish the price of a baker's waggon sold by the execution debtor a few days after he had abandoned the occupation of baker and had entered upon the occupation of laundryman.

Judgment of the First Division Court of Grey reversed.

Statement.

THIS was an appeal by the primary creditor from the judgment of the First Division Court of Grey (Morrison, J.), and was argued before OSLER, J. A., on the 28th of December 1895.

W. A. Bishop, for the appellant.
H. B. Spotton, for the respondent.

December 31st, 1895. OSLER, J. A.:—

The question is as to the right of the creditor to garnish the sum of $25, the price of a baker's delivery waggon sold by the debtor to the garnishee. The debtor claims that the waggon was exempt from execution under subsection 6 of section 2 of the Execution Act, R. S. O. ch. 64, as being a chattel ordinarily used in the debtor's occupation, and, having been sold by him, that the price was also exempt from attachment.

It appeared that up to a short time before the sale of the waggon, the occupation of the debtor had been that of a baker, and that the waggon had been used by him in and

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for the purpose of that business. He first lent and afterwards sold it to the garnishee, and at the time he did so, he was not actually engaged in the baking business, but had gone into the employment of a laundryman.

The exemptions in clause 6 of section 2, are of a qualified character.

They are "tools and implements ordinarily used in the debtor's occupation." When they cease to answer that description, they cease to be exempt, though it may seem probable from the wide language of section 4 that if the debtor dies while following his occupation, his widow becomes entitled to all the exemptions which he might have claimed. But if he abandons the occupation for the purpose of enabling him to carry on which the tools and implements employed in it were exempted, the reason for protecting them against the claims of his creditors no longer exists. Whether he has so abandoned it is a question of fact. Having regard to the object of the statute, passed as it was in ease and favour of the debtor, an abandonment would not necessarily be presumed from a mere temporary cessation of the particular occupation in which the exempt implement had been used, even where it was followed by the actual change of employment. All the surrounding circumstances must be taken into consideration, just as when the question of change of residence is examined in relation to the qualification of a voter.

The case comes before me in a rather unsatisfactory way. The parties consented at the trial to an appeal, but the evidence is not reported, both sides apparently being satisfied to take the judgment as containing a sufficient statement of it. The learned Judge says that the primary debtor "having decided to give up the business of a baker, first lent and afterwards sold to the garnishee the waggon he had theretofore used in his business of a baker;" and again: "Before the sale of the waggon the primary debtor had not only gone out of the business of baker, but had gone into the employment of a laundryman." And his reason for giving judgment in

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favour of the debtor, was that as the sale of the waggon had taken place only a few days after he had gone out of the business of baker, and when he was apparently only then temporarily employed with the laundryman, the waggon might still at the time of sale be fairly considered a chattel ordinarily used in the debtor's occupation.

I do not understand the learned Judge to have found that the employment as laundryman was in truth temporary, or that the debtor had any intention of renewing his former occupation.

There is nothing before me which enables me to regard his finding that the debtor "had decided to give up" and had "gone out of" the business of baker, as otherwise than a finding that he had abandoned the occupation, at all events as regarded any fixed contemplation of returning to it. The very fact of the sale of the waggon points in the same direction, and helps to confirm that conclusion. And if this be so, I am unable, with all respect to the learned Judge, to agree with him that the shortness of the interval which elapsed between the abandonment of the business and the sale of the waggon, can be of any importance, except, perhaps, as suggesting a doubt as to the exact time when the business was really given up. If it was in fact abandoned, then from that time, whenever it was, in my opinion, the chattel ceases to be exempt; and if so, the price of it when sold, would be garnishable in the purchaser's hands. On the fact found, as I am obliged to say it is found, with nothing before me which enables me to review it, or to say that the Judge has not taken into consideration everything that he ought to have so taken, his judgment, in my opinion, should have been in favour of the execution creditor, and I must, therefore, allow the appeal with the usual costs. I refer to *Atwood* v. *De Forest*, 19 Conn. 512; *Davis* v. *Wood*, 7 Mo. 162; *Caswell* v. *Keith*, 12 Gray 351; *Wilkinson* v. *Alley*, 45 N. H. 551.

Whether the debtor has a right to sell a chattel exempt under clause 6, while it is exempt, is not now to be decided, but I must say that I see no reason why he should not be

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able to do so, so long as it is in good faith and without the fraudulent purpose which the execution creditor suggests such a power might be applied to in withdrawing the debtor's means from the reach of creditors.

Appeal allowed.

COONEY v. SHEPPARD.

Husband and Wife—Employment in which Husband has no Proprietary Interest—R. S. O. ch. 132, sec. 5.

"Proprietary interest" in section 5 of R. S. O. ch. 132, means "interest as an owner," or "legal right or title."

When a married woman rents a farm and employs her husband to work it, he has no "proprietary interest" in the grain raised thereon, and it is not liable to seizure by his creditors.

Judgment of the Second Division Court of Northumberland and Durham affirmed.

Statement. THIS was an appeal by the execution creditor from the judgment of the Second Division Court of Northumberland and Durham (Ketchum, J.), and was argued before OSLER, J. A., on the 20th of December, 1895.

W. R. Riddell, for the appellant.
Aylesworth, Q. C., for the respondent.

December 21st, 1895. OSLER, J. A.:—

This is an appeal from a judgment in favour of the claimant in an interpleader issue. The claimant is the wife of the judgment debtor. The property seized consists of a quantity of cattle and farming implements, and grain raised on the farm, on which the claimant and her husband reside. Her case is that the farm is her farm, and the grain and other property her property free from any interest of her husband therein.

I do not think it necessary to enter at much length into

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the evidence. The following statement will explain the nature of the case and the point to be decided. The judgment debtor had been for some years and up to April, 1895, tenant of a farm of 100 acres, evidently getting behind with the world, his debts increasing and his rent unpaid. The crisis came in October and November, 1894. The landlords distrained, the execution creditor came in, and the whole of the chattels, barring the exemptions, were swept away. The latter were sold, and the proceeds went in supporting the family. Thereupon husband and wife consulted as to the best way to meet the future, and it was determined that the experiment should be tried of making the wife the tenant and manager, the husband working upon the farm for her, practically, no doubt, working it as before. The landlords re-let the premises to her. She borrowed $200 from her brother and stocked the farm in a small way with cattle and other things bought with the money. It was proved that the landlords would not have re-let to the husband, and the learned Judge has found the whole transaction from first to last honest and *bonâ fide* and that the wife is the real tenant of the farm and the real owner of the goods, and that the husband has no proprietary interest therein. On all questions relating to the good faith of their dealings, the evidence impresses me as it impressed the learned trial Judge, and his findings of fact on the evidence, of which I have given but a bald outline, cannot be disturbed.

The only question to be decided is whether the property seized, so far as it consists of crops or the produce of the farm, is property gained or acquired by the claimant in any employment, trade or occupation in which she is engaged, or carries on, and in which her husband has no proprietary interest, within the meaning of the 5th section of the Act respecting the property of married women: R. S. O. ch. 132. The other chattels bought by or given to her are of course her separate property by force of the 2nd sub-section of section 5.

I agree with the learned Judge below in regarding the

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cases decided under the former Act, R. S. O. (1877) ch. 125, on the subject of a separate trading by a married woman, as having little or no bearing on the present question. It is by no means easy to reconcile the opinions expressed by different Judges in the cases which came before them, and I think it was for the purpose of preventing this difficulty from arising in future and of placing the right of a married woman to carry on a trade or occupation, in the same plane, or nearly so, as her right to possess real and personal property, that the Legislature passed the law, viz., 50 Vict. ch. 7, sec. 22 (O.) as it now stands in R. S. O. ch. 132, sec. 5.

The question no longer is whether the proceeds or profits which the husband's creditors are attempting to grasp are derived from an occupation or trade which the wife carries on separately from her husband, but whether the "property," whatever it may be, has been "gained or acquired by her in an employment, trade or occupation in which she is engaged or carries on, and in which her husband has no proprietary interest." That is the only limitation. The meaning of the expression is not defined, and although it is an unusual one, I have no reason to suppose that it is employed in any technical or limited sense. It signifies simply "interest as an owner" or "legal right or title." If a married woman may be the owner or tenant of a farm, I know of nothing in the relation of husband and wife which forbids the latter, as the law now stands, from engaging in the occupation of farming and procuring her husband to manage and work the farm for her or as her agent or manager, more than any other trade or occupation which she may choose to carry on, although, no doubt, as the learned Judge below says, in what I may be permitted to characterize as a very able and careful judgment, "the interference of the husband in the business must always be an element in determining the *bona fides* of the wife's claim."

The judgment of the Court of Appeal in *Baby* v. *Ross*, 14 P. R. 440, was a practical application of this view of the

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statute. I refer also to the judgment of my brother MacMahon in *Robertson* v. *Larocque*, 18 O. R. 469, 474; the only other reported case, so far as I am aware, upon the meaning of the words "proprietary interest."

Mr. Riddell cited two cases from the Manitoba Reports: *Slingerland* v. *Massey Manufacturing Company*, 10 Man. R. 21, and *Goggin* v. *Kidd*, 10 Man. R. 448. I need hardly say that I should pay great deference and attention to any decision of the able Judges of the Supreme Court of that Province; but when the difference between the Manitoba Act and our own is noted, it is evident that these cases cannot be of the least assistance in construing the 5th section of the latter. The provisions of the 5th section of the Manitoba Act substantially are as follows: "The real estate and property mentioned in the 2nd and 3rd sections of this Act and the rents, issues and profits thereof shall * * be held and enjoyed by any married woman, for her separate use, etc. * * And any married woman may, by herself alone, enter into any contracts whatsoever in respect of any such real estate or property, or the management of the same, or the proceeds or issues thereof, * * and the doing of all other acts, matters and things requisite or expedient, in or about the management and handling of, and the dealing with, all and singular the premises, without any consent or concurrence on the part of her husband, as if she were a *feme sole*, etc." In the judgment of Killam, J., in the former case, construing the section, the following observations occur: "I cannot consider the farming operations to have been an occupation or trade carried on by the wife separately from her husband. * * With her concurrence, he may lawfully occupy the land and sow and gather the crops. If he do so, they are his and not hers, although they come within the term 'issues and profits.' * * If the wife chooses, she can exclude her husband from the possession or use of her property, and she is thus protected in the rents, issues and profits; but the crops raised by her husband on the land do not necessarily belong to her as issues and profits any more than if raised

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by a tenant. * * The issues and profits that are protected are to my mind such proceeds as are strictly and exclusively issues and profits of the land, and not those *plus* the proceeds, in part, of the husband's labour." And *per* Bain, J.: "The application of the section must be limited in the case of such issues and profits, to crops that the married woman has herself grown upon land that is her separate estate. If she has rented her land, the crops raised on it will not be hers, but her tenant's, and in the same way if she allow her husband to occupy and farm her land the crops will belong to him."

These cases may, in short, be said to turn upon the old question whether the wife was carrying on the business separately from her husband, which, as I have said, is not the question for decision under our statute.

I am, therefore, of opinion that the appeal must be dismissed, with the usual costs.

Appeal dismissed.

PAVEY V. DAVIDSON.

Action—Fraudulent Conveyance—Mortgage of Foreign Land.

Where all parties reside in this Province an action can be maintained here by a creditor to have it declared that a mortgage of foreign land, containing the usual covenant for payment, was taken in the name of the mortgagee instead of the debtor, in order to defraud creditors, and that the mortgagee was a trustee for the debtor of the moneys secured by the mortgage.

Judgment of ARMOUR, C.J., reversed, OSLER, J.A., dissenting.

Statement.

THIS was an appeal by the plaintiffs from the judgment of ARMOUR, C. J.

The plaintiffs were creditors of the defendant Ebenezer Davidson, and brought the action on behalf of themselves and all his creditors, alleging that he had conveyed certain land in Oregon, of which he was the owner, to his father, the defendant Alexander Davidson, who had then given to the defendant Alexander Purdom, a mortgage to secure the purchase money, the mortgage containing a covenant in the usual form for payment; and further alleging that this mortgage had been thus made to delay, hinder, and defraud the plaintiffs, and they claimed that Purdom might be declared a trustee for Ebenezer Davidson of the moneys secured by the mortgage. All the parties to the action resided within the Province of Ontario. After the issue of the writ the defendant Purdom died, and his executor, T. H. Purdom, a resident of Ontario, was added as a defendant.

The defendants demurred, and ARMOUR, C. J., in allowing the demurrers, delivered the following judgment:—

This case appears to me to be governed by the law as laid down by the Chancery Division in the case of *Burns* v. *Davidson*, 21 O. R. 547, in which the same transaction which is here sought to be impeached, was sought to be impeached, and the decision in that case is equally applicable to and is decisive of this case.

It is true that in that case the relief claimed was that the conveyance of the lands, made by Ebenezer Davidson

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ARMOUR, C.J.

to Alexander Davidson, and the mortgage made by Alexander Davidson to Alexander Purdom, might be declared fraudulent and void, or that the defendants might be restrained from further dealing with the lands, while in this case the relief claimed is that Alexander Purdom be declared to be a trustee for Ebenezer Davidson of the mortgage, and the money secured thereby, but the only ground upon which the relief claimed in either case could be obtained would be the same, and would be the determination that the conveyance of the lands by Ebenezer Davidson to Alexander Davidson, and the conveyance of the lands by way of mortgage by Alexander Davidson to Alexander Purdom, were fraudulent and void as against creditors.

The determination of this question would necessarily be according to the law of the place where the lands are situate, and could only be properly determined in the forum of that place: *In re Hawthorne, Graham* v. *Massey*, 23 Ch. D. 743.

The granting of the relief claimed in this action would not only involve the determination of this question, but would directly affect the title to these lands by declaring a trust in respect of them, which I do not think this Court has power to do.

"For although the person may be within the territorial jurisdiction, yet it is by no means true, that in virtue thereof, every sort of suit may there be maintainable against him. A suit cannot, for instance, be maintainable against him, so as absolutely to bind his property situate elsewhere; and, *a fortiori*, not so as absolutely to bind his rights and titles to immoveable property situate elsewhere": Story on Conflict of Laws, 8th ed., sec. 543.

The defendants in this case are within the jurisdiction, and where such is the case, the Court, as it acts *in personam*, may make a decree upon the ground of a contract or any equity subsisting between the parties respecting property situated out of the jurisdiction, but this is done only in cases in which some privity exists between the plaintiff

and the defendant, and none such exists in this case: *Norris* v. *Chambres*, 29 Beav. 246; *Companhia de Mocambique* v. *British South Africa Co.*, [1892] 2 Q. B., at p. 404. Judgment, ARMOUR, C.J.

In *Henderson* v. *Bank of Hamilton*, 20 A. R. 646, the Court, after referring to cases on the subject, say: "From these cases and many others which might be cited it will be seen that the jurisdiction of the court in such cases as the one before us, is founded upon the existence of some contractual obligation expressed or implied, or some trust or equity between the parties, which the court, acting *in personam*, and upon the conscience of the party affected by it, will enforce in that manner."

The demurrers will be allowed with costs.

A previous demurrer had been allowed, on a question of pleading, but an amendment had by leave been made, and it is not necessary to refer further to that application.

From the judgment of ARMOUR, C. J., the plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of September, 1895.

Gibbons, Q. C., for the appellants. The cases relied on below are distinguishable. They are all cases where the title to foreign land came in question. That is a very different thing. *Burns* v. *Davidson*, 21 O. R. 547, deals with this, and *Strange* v. *Radford*, 15 O. R. 145, emphasizes the distinction. It is not necessary to go as far here as was done in *Strange* v. *Radford*. No remedy as to the land is sought. The appellants merely desire to have a declaration as to persons living in this Province, and the nice questions of jurisdiction raised in many of the cases, do not arise here. The relief here sought no more affects the title than if a mortgagee residing here sued the mortgagor residing here on his covenant to pay. This action merely carries the relief one step farther so as to make the mortgagee a trustee for the creditors.

Argument. *J. H. Purdom*, and *Francis Love*, for the respondents. It is impossible to declare a trust as to the debt without affecting the foreign lands, and this cannot be done. The reasoning in the judgment appealed from is unanswerable.

Gibbons, Q., C., in reply.

January 14th, 1896. HAGARTY, C. J. O.:—

I agree, not without hesitation, that the demurrers should be overruled and the defendants be called on to answer.

At first I had a strong impression that the learned Chief Justice who allowed the demurrers was right; that there being no privity of contract or fiduciary relation existing between the executor Purdom, or his testator, or the mortgagor of the foreign land, and the plaintiff seeking relief, that there could be no trusteeship here declared to affect the foreign land.

I think there has been for years an increasing disinclination in the English Courts, in any way to deal with foreign land where no such privity exists.

But the demurrers admit necessarily the statement of the alleged fraudulent scheme to delay and defeat creditors; and that the mortgagee holds the mortgage as trustee for the original debtor, and that if he has realized upon it that he holds the proceeds in trust for that debtor, and the plaintiffs ask for a receiver.

There is no attempt, as in the former proceedings, to set aside the deed or mortgage.

The claim or attempt is, as was stated in argument, in substance to attach any moneys the alleged trustee may have collected or that may come to his hands, as really a debt due to the debtor Ebenezer Davidson on the sale of the foreign land.

One may foresee much difficulty in the creditors' way in enforcing these claims, but that difficulty need not be discussed here.

The plaintiffs, the mortgagor, and the mortgagee, all live within the jurisdiction.

Judgment.

HAGARTY, C.J.O.

I think on the whole, we must disallow the demurrers and require the defendants to answer the plaintiffs' charge.

In all the cases which I have examined, I have found that the facts have been fully gone into, and no decision on demurrer to a claim stated as this appears.

The defendants cannot ask us to take as a fact the statement as to the registered discharge of the mortgage in Oregon, which is irregularly introduced into the demurrers.

BURTON, J. A. :—

I am unable to agree that this case is governed by the law as laid down in *Burns* v. *Davidson*, 21 O. R. 547, nor is it affected by the decision of this Court when the case was before us on a previous occasion. We then decided that inasmuch as there was nothing upon the record to shew that the mortgage contained a personal covenant, we were powerless to interfere ; any attempt by this Court to affect lands in a foreign country would have been, to quote the language of Mr. Westlake, not only presumptuous, but ineffectual , but no such difficulty is presented when a suit is brought to set aside as fraudulent a transfer of a debt made by a person in fraud of creditors, all parties being within the jurisdiction, and the same rule applies where a covenant has been made to a third person instead of the actual person entitled, in order to keep it out of the reach of creditors. It can make no difference in that case that the covenant is secured by mortgage on lands in a foreign country.

I am afraid we could not recognize as good law in this country many of the cases cited by the appellants' counsel in his reasons of appeal, but the last reason is sound, and is sufficient to dispose of the case, viz. :—

" Here the remedy sought is personal only, and the parties are all within the jurisdiction. It is submitted, with deference, that the plaintiffs are entitled to maintain this action, and that it cannot be a hindrance to their getting at moneys

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belonging to the debtor, because they happen to be secured by mortgage on lands in a foreign country."

It has been suggested that the statement of claim is defective in not shewing where the covenant was executed, the presumption being, as it was contained in a mortgage on lands in a foreign country that it was executed there. I do not think so. The presumption is, I think, the other way, and if there is anything in the objection, it should have been raised by the defendants; they do not suffer by this decision, as they may still raise the question if so advised.

I am of opinion, therefore, that the appeal should be allowed and the demurrers overruled with costs.

MACLENNAN, J. A.:—

These demurrers are not in proper form, for besides alleging that the statement of claim discloses no cause of action, they go on to introduce a number of facts not set out in the statement of claim as reasons and grounds for sustaining the demurrers. The plaintiffs ought to have moved, either to set aside both demurrers altogether as embarrassing, or, at all events, to strike out the speaking parts of them. Treating them, however, as demurrers in proper form, I am of opinion that they ought to be overruled.

The demurrer of Ebenezer Davidson fails, for the reason that whether the plaintiffs shew themselves entitled to any other relief or not, they are clearly entitled to judgment for their debt against that defendant.

The other objection upon which both the demurring defendants rely is, that the plaintiffs can have no relief, because the debt which is alleged to have been fraudulently assigned is secured by mortgage of lands in a foreign country, namely, the State of Oregon. The substance of the plaintiffs' allegation is, that the debtor owning land in Oregon, sold it to his father for $6,500, and in order to prevent his creditors from reaching the purchase money, procured a mortgage for the purchase money to be made

Judgment.

MACLENNAN, J. A.

to the defendant Alexander Purdom, as his, the debtor's, trustee. They allege, moreover, that the mortgage so made contained a covenant with the mortgagee for payment of the mortgage debt. Now, if upon this statement of facts the plaintiffs are entitled to any relief in respect of that mortgage debt against the demurring defendants, their demurrers must be overruled, and I think the plaintiffs are so entitled. In a former action between the same parties, in which in the month of March, 1893, we gave judgment allowing a demurrer, the relief which was sought was to set aside as fraudulent against creditors, not an assignment of the purchase money, but the sale and conveyance of the Oregon lands themselves. That we held the Court had no jurisdiction to do, involving as it did, a direct exercise of jurisdiction over lands in a foreign country. In the present case, however, no relief is sought in respect of the mortgaged lands. What is sought to be reached is merely the debt. The fact that the debt is secured upon land is a mere incident. The debt is the substantial thing, and inasmuch as it may be sued for and recovered in any jurisdiction where the debtor may happen to be, irrespective of the presence or absence of security, and irrespective of whether it be a mortgage debt, or any other kind of a debt, so it is immaterial where the lands are situate if it is secured by mortgage upon land. It is clear that an action may be maintained upon the covenant contained in a mortgage upon foreign lands, just as if the lands were situate in this Province; and the mere fact that they are situate in a foreign country is no answer. If it were otherwise, then a mortgage debt secured upon lands in two different countries could not be sued anywhere. The debt in question, therefore, being one which could be reached in our Courts by the debtor's creditors, may be the subject of a fraudulent transfer to defeat those creditors. It follows that our Courts necessarily have jurisdiction to undo such fraud, and to relieve the creditors therefrom. The demurrers must be overruled with costs, and the defendants will have leave to file a statement of defence if they are so advised.

Judgment.

OSLER, J.A.

OSLER, J. A.:—

I regret that I am unable to come to the same conclusion. It seems to me that this is in effect a contest as to the title to foreign land, and that there is no jurisdiction to entertain the action. I agree with the judgment of the learned Chief Justice of the Court below. I must add that it is evidently by inadvertence that an order has been drawn up allowing the demurrer of Ebenezer Davidson, who is merely sued for the debt he owes the plaintiffs. Counsel should have brought this to the attention of the Court below or seen the Registrar, and there should be no costs so far as that particular demurrer is concerned.

Appeal allowed, OSLER, J. A., *dissenting*.

MACTAVISH V. ROGERS.

Bankruptcy and Insolvency—Assignments and Preferences—Action by Creditor in Assignee's Name—R. S. O. ch. 124, sec. 7.

If a preferential security is successfully attacked by a creditor suing on his own behalf under an order of the Court in the name of the assignee he can recover no more than his own claim and costs.

A creditor cannot after obtaining such an order increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to take part in the proposed proceedings.

The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity.

Judgment of STREET, J., varied.

Statement.

THIS was an appeal by the defendant from the judgment of STREET, J.

On the 6th of May, 1892, a chattel mortgage was made by a farmer named Anson B. Nicholls, in favour of the defendant, to secure an indebtedness of $150. The validity of this mortgage was not disputed. On the 29th of March, 1893, another chattel mortgage was made between the same parties to secure future advances, and it was not registered. On the 19th of September, 1893, Nicholls made an assignment for the benefit of creditors to the plaintiff. Before the assignment was made, the plaintiff had been instructed by the defendant to take possession under the chattel mortgages on his behalf, and possession was taken by him, it being a question whether possession was taken by him as assignee or as bailiff for the defendant. It is not necessary, however, in view of the decision of the Supreme Court of Canada in *Clarkson* v. *McMaster*, 25 S. C. R. 96, to give the facts as to the taking of possession. The chattels were sold and realized $928.75, and the proceeds were paid to the defendant whose claim amounted to more than that sum.

On the 12th of October, 1894, the firm of J. Fleury's Sons, who were creditors of Nicholls, obtained an order allowing them to bring this action in the plaintiff's name to set aside the second mortgage. Nicholls owed them $712.74, and owed the defendant a balance of $136.92 on the first

Statement. mortgage. After the order was obtained, and before the writ was issued, J. Fleury's Sons acquired the claims of two other creditors of $168 and $40 respectively.

The action was tried at London, on the 3rd of May, 1895, before STREET, J., who held that the mortgage in question was bad, and ordered the defendant to account to the plaintiff for the whole proceeds of the sale.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 8th and 11th of November, 1895.

Shepley, Q. C., for the appellant.
Watson, Q. C., and *S. C. Smoke*, for the respondent.

Upon the argument, the nature and effect of the possession were very fully discussed, the appellant contending that possession had been taken, and had cured the defects in the mortgage; that the proceeds could not be followed; and that at the worst he was not liable to pay more than the claim of J. Fleury's Sons.

January 14th, 1896. HAGARTY, C. J. O.:—

I think that the learned Judge was right in his view of the case.

The assignment was executed before any possession was taken by the mortgagee. The rights of the creditors then accrued, and no subsequent possession could avail against them. The assignee says he acted both as assignee and as bailiff for the defendant. There is no reason to suspect any bad faith on his part.

The true state of facts, and not his misconception of them, must govern. There can be no estoppel, as the defendant claimed, against these rights.

It was urged before us that J. Fleury's Sons had no right to acquire other claims against the estate after obtaining

this order and that such claims could not be included in this action.

Judgment.

HAGARTY, C.J.O.

I think their claim must be confined to what was the ground work of their being allowed to intervene. We must assume that the other creditors represented by the assignee declined intervention and that the creditor proceeding under the statute ought not to be permitted, after obtaining his order on his specified claim, to buy up any or all of the outstanding claims and embody them in his action.

The state of facts on which he obtains the order from a judge must be that on which it has to be determined whether his case falls within the statute or not. His subsequent purchase of other debts might create a wholly different situation.

I do not think that the creditors, as a body, can acquiesce in such a course as the order shews and then be allowed to hand over their claims to the one creditor asking for the order. If the assignee were acting against the creditors' desires it might be a reason for relief to them by removal of the assignee or ordering him to proceed.

Another question of importance remains, whether the creditor suing in the name of the assignee, under section 7, sub-section 2, of the Act, R. S. O. ch. 124, is entitled to apply all the moneys recovered to his own use, though in excess of his own claim and costs.

It is enacted that if any creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the estate, and the trustee, under the authority of the creditors or inspectors, refuses or neglects to take such proceedings after being duly required so to do, the creditor shall have the right to obtain an order authorizing him to take the proceedings in the name of the trustee, but at his own expense and risk, upon such terms as to indemnity to the assignee as may be directed, "and thereupon any benefit derived from the proceedings shall belong exclusively to the creditor instituting the same for his

Judgment.

HAGARTY, C.J.O.

benefit," and there is reserved the right to the assignee before the order is granted to intervene and sue for the benefit of the estate.

The creditor insists that although his actual claim on the estate be under $400 he is entitled to all moneys recovered, if ten times in excess of that amount.

I cannot believe that the Legislature intended or contemplated such a result. He is declared to be entitled to any benefit derived from the proceedings. I think this must be construed as to his position as a creditor. The amount is recovered as being the property of the estate, and is only recoverable in the name of the assignee by using his name, and in his right, not in any right of the creditor individually.

His "exclusive benefit" in the proceeding is that he is to have all the proceeds applied to pay his whole claim, so far as it will apply, and his costs incurred, and this to the exclusion, so far, of all the other creditors. He gets this benefit as his reward, as it were, for incurring the risk of defeat. But the whole proceeding is under the general scope and bearing of the statute regulating the distribution of an insolvent estate and the realization of its assets.

The amount recoverable is what is required to discharge the adventurous creditor's lawful claim.

If the argument be sound the result would be that on a claim of $500 the creditor under the statute may recover $5,000.

I construe the section as giving the creditor the full amount of his claim in preference to all other creditors, but no further, having due regard to the general bearing and effect of the statute, and I think the recovery here should be limited to the actual claim of J. Fleury's Sons with their costs of suit.

BURTON, J. A. :—

I think the judgment in favour of the plaintiff must be affirmed, but I do not agree with the learned Judge as to the amount which the plaintiff is entitled to recover.

Judgment.

BURTON, J.A.

The learned Judge has held that under sub-section 2 of section 7 R. S. O. ch. 124, the creditor is entitled to hold for his own benefit whatever he may recover, quite irrespectively of the fact that the sum so recovered is largely in excess of his claim against the insolvent.

I cannot say that I am surprised at his so holding, as a great diversity of opinion has long existed in reference to the proper construction of that sub-section.

It has been thought by some that inasmuch as the creditor puts the law in motion at his own cost and risk, it was intended that the fruits of the litigation should belong exclusively to him.

Others have held the opinion that he is entitled to deduct from the sum recovered the amount of his debt, interest, and costs, and to account to the assignee for the surplus for the benefit of the creditors generally; and others again hold that the recovery itself must be limited to the amount due to himself at the time he obtains the order enabling him to sue, together with interest and costs.

The last of these is, I think, the correct view.

If the assignee were suing a debtor of the insolvent for the general benefit of the creditors, if the amount recovered exceeded the aggregate amount of those creditors' claims, is it not manifest that any surplus over and above their claims would belong to the insolvent?

If the creditors decline to bring such an action, it is open to any creditor to apply for leave to bring an action on his own behalf and for his own benefit in the name of the assignee; but although in form an action by the assignee, it is in substance and in fact an action by that creditor and for his own benefit; that is to say, he is to apply it to his own debt, and not to share the sum recovered rateably, as would be the case if it were the assignee's own action. By this means he gets all that he is entitled to get, unless we are to place a very strained, and I think a very unreasonable, construction upon the words

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BURTON, J.A.

of the sub-section. His debt is, say $200, the sum recovered $2,000; upon what principle is he to be allowed to appropriate the $1,800? It may be that it might be known to the creditors generally that the debt, though legally due, was one which in fairness ought not to be enforced, and they declined, therefore, to enforce it. That action would not be binding on the dissentient creditor, but why should he recover more than his own debt. But the injustice of such a construction is brought out in bold relief in the present case. The defendant was not a debtor of the insolvent, but a creditor holding security, which, as between himself and the insolvent, was perfectly valid.

The creditors decline to impeach his security, but this plaintiff, in the exercise of his statutory right, attacks it, and successfully, inasmuch as against him it was void if he elected so to treat it; but would it not be most unjust to allow him to recover from this defendant more than his real debt?

Upon the second contention, it is sufficient to say that the creditors had elected not to impeach the transaction, and are not entitled therefore to the surplus.

Full effect is given to the words of the sub-section if we confine the recovery of the plaintiff to his own debt, interest and costs.

I rather gather from the appeal book, that the learned Judge felt himself hampered by the terms of the order, which seemed to provide that if entitled to recover at all, it would be for the whole proceeds of the sale over and above the amount of the first mortgage. If the construction I place upon the statute be the correct one, the order was in that respect *ultra vires* and void.

I agree with the other members of the Court in holding that the plaintiff had no right to add the other debts to his claim, which must be confined to the debt mentioned in the order.

With these alterations the judgment should be affirmed.

OSLER, J. A. :—

Judgment.

OSLER, J.A.

The recovery of the creditors who are prosecuting this action in the name of the assignee under the authority of section 7 (2), R. S. O. ch. 124, must be limited to the amount of their claim against their debtor, and to the amount of that claim as it existed when they obtained the order allowing them to proceed under that section. They could not augment it by buying up, after that order was made, the debts of other creditors of the assignor. The order was made on proof that the assignee trustee, in the interest of the estate, as representing all the creditors but those who had required him to take proceedings, had refused, under the authority of the creditors or the inspectors, to take them. Then those who disagreed with the other creditors had the right to go to the judge and obtain an order allowing them at their own risk to take the proceedings in the assignee's name. Their status as creditors was settled then, and they could no more add to their claim the debts of other creditors assigned to them after that order and sue for them, than such creditors themselves could have sued for their debts in the assignee's name without an order.

The creditors, however, contend that no matter what the amount of their debt may be, they are entitled to recover, under the terms of section 7 (2), the whole subject of the action.

I do not think that a reasonable construction of the provisions of the section: If at any time any creditor desires to cause any proceeding to be taken which would, in his opinion, be for the benefit of the estate; and the trustee refuses or neglects to take such proceeding, the creditor shall have the right to obtain an order authorizing him to take the proceedings in the name of the trustee, and thereupon any benefit derived from the proceedings shall belong exclusively to the creditor instituting the same for his benefit.

Had there been no assignment under the Act, a creditor

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OSLER, J.A.

desirous of attacking the fraudulent or preferential transfer could only have avoided it so far as might be necessary to satisfy his own claim. Had the assignee taken proceedings he could have recovered no more than was necessary to pay all the creditors in full, a quite conceivable case if the liabilities were less than the value of an important asset which the debtor had attempted to withdraw. That would be the utmost limit to which the "proceeding" could have been pushed "for the benefit of the estate"—the payment of all the creditors in full. If all the creditors but one or two decline to risk proceedings, what "benefit" can the adventurers gain—what ought they to gain—more than payment in full, or so far as the salvage will go, of their debts? That is the only legitimate benefit they can derive from the proceedings, and the Act in terms gives them no more in saying that any benefit shall belong to them "exclusively." That only means that they shall not be compelled to share it with other creditors. Everything beyond this remains in the hands of the defendant, on the principle that the transaction is only set aside so far as it is necessary to pay the claim of the attacking creditors. The case of *Société Générale de Paris* v. *Geen*, 8 App. Cas. 606, may be referred to.

On the part of the defendant, it was further contended that the plaintiff having been appointed by him his bailiff to take possession of the goods under the chattel mortgage, could not, in this action, set up its invalidity; and that as he had allowed the defendant to receive the proceeds of the sale of the goods, he could not now sue for the recovery of such proceeds. Upon the best consideration I have been able to give to this point, and with every desire to find a firm ground on which to support an honest claim, I am compelled to say that these contentions are not, in my opinion, tenable. It was quite competent for the plaintiff to accept the position of trustee or assignee for creditors. He was under no disability or incapacity. Had he after his appointment refused to act, another assignee could be appointed to whom it would have been open to assert the

objection now taken to the chattel mortgage and to recover the money the proceeds of the sale. Judgment. OSLER, J.A.

It cannot be said that the plaintiff took possession solely for the mortgagee; indeed, under the recent decision of the Supreme Court in *Clarkson* v. *McMaster*, 25 S. C. R. 96, it would seem that even had he done so, it would not have availed the defendant. The action is really the action of the creditors who are authorized to prosecute it in the name of the assignee, and I see no principle on which it can be defeated by shewing that in his private capacity the nominal plaintiff had assumed a position which might conflict with his duty to the creditors generally. I must add that, having regard to the object of the Act, and the right conferred by section 7 upon the creditor, there is, in my opinion, no ground for saying that the defendant is entitled to lessen the amount of the plaintiff's recovery by deducting some dividend or proportion in respect of his own debt. *A fortiori* is that the case where the amount in the defendant's hands is more than sufficient to satisfy the plaintiff's claim.

The appeal should therefore be allowed by reducing the amount of the judgment to the sum due upon the plaintiffs' claim on their own notes at the date of its recovery.

The appellant should have his costs of the appeal.

MACLENNAN, J. A. :—

I think that this appeal fails on the main question. The action is brought to recover from the defendant the proceeds received by him on the sale of property comprised in a chattel mortgage, bearing date the 29th of March, 1893. The plaintiff is the assignee for the benefit of creditors of the mortgagor, one Nicholls, and the ground on which the money is sought to be recovered is, that the defendant's chattel mortgage had not been filed as required by the Act relating to mortgages and sales of personal property. The defendant's mortgage is not attacked as fraudulent under the Act relating to assignments and preferences. It was an honest mortgage, given for an honest debt, and the sole

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MACLENNAN, J.A.

ground of attack is want of registration, which, by section 2 of 55 Vict. ch. 26 (O.), has been made necessary as against an assignee for the general benefit of creditors. What took place was that the plaintiff was employed by the defendant as his agent to enforce his mortgage by taking possession of the mortgaged property and selling it; and the plaintiff, after accepting the agency and without the knowledge or consent of the defendant, accepted an assignment for the benefit of his creditors from the debtor. He then advertised the property for sale, both under the mortgage and under the assignment. He allowed the defendant to deal with the purchasers of the goods during the sale, and to receive the money or notes for the price, towards satisfaction of his mortgage, all without objection by himself or by any creditor; and the present action is to recover back the money so received. It was a somewhat strange thing for the plaintiff to do, but it is accounted for by supposing that the fact that the mortgage had not been registered was not present to his mind.

I was at first strongly of the opinion that by reason of the plaintiff's relation to the defendant as his agent, he could not maintain this action, that for that reason he could not be heard in a court of justice to say that the money which the defendant had received through his instrumentality was not rightfully and properly received, or that it ought to be recovered back. Further reflection has led me to the conclusion that these considerations cannot prevail. The Act, 55 Vict. ch. 26, sec. 2 (O.), makes the non-registration of a chattel mortgage a ground of invalidity as against simple contract creditors, and against an assignee for the general benefit of creditors. The effect of the recent decision of *Clarkson* v. *McMaster*, 25 S. C. R. 96, in the Supreme Court of Canada, is to declare that such a mortgage, if not registered within the time limited, becomes, and is, from the moment the time for registration has elapsed, void in law as against any then existing creditor or creditors. In the present case there were such creditors, and the defendant's mortgage was void as against them before and at

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MACLENNAN, J.A.

the time he employed the plaintiff as his agent. When, therefore, the plaintiff became assignee, which he did without any improper motive, the property which was assigned to him was already the property of the creditors as against the defendant, and the plaintiff's personal relation to the defendant could not make any difference. At that moment too, the defendant became aware that his agent had assumed the character of an assignee. If he thought his interests required it, he could have revoked the agency, but he did not do so, nor did he object to the plaintiff's new character. He allowed the plaintiff to act in both characters, and to advertise and sell as assignee as well as in his character as agent.

The plaintiff having done that without objection by the defendant, must be taken to have acted in accordance with the true legal and equitable rights of all parties, and the sale must be regarded as having been made primarily for the benefit of the creditors, and only subordinately for the benefit of the defendant if there should happen to be any surplus. Then does it make any difference that the defendant was allowed to deal with the purchasers, and to receive the money and notes which they gave for the property which they bought? I do not think it does. What the defendant received was the property of the creditors, and he may properly be regarded by them as a person assisting the assignee in the sale, and therefore accountable, just as the assignee was accountable, for money which he received.

Nor is the assignee precluded from recovering by reason of his personal relation to the defendant, and his consent and acquiescence in the defendant's receipt of the money for his own benefit. The assignee is here asserting and enforcing the rights of the creditors, not any right of his own. The statute gives the right to the creditors; and by section 7 of the Act relating to assignments, enacts that whenever there has been an assignment for the general benefit of creditors, that right shall be enforced by the assignee and by him alone.

Judgment.

MACLENNAN, J.A.

I am, therefore, of opinion that this appeal should be dismissed as regards the creditors' original debt.

Besides the general question, there is a further one calling for decision. After the order obtained by these creditors enabling them to bring this suit in the name of the assignee, but for their own exclusive benefit, they purchased and acquired further claims against the debtor's estate from other creditors, and they claim the right to be paid this additional claim, as well as their original debt. I think the creditors must be confined in their recovery to the amount of their original debt. I think their status in relation to this action must be regarded as having been fixed when they obtained the order allowing it to be brought. The defendant is himself a creditor, and perhaps the largest creditor of the estate, and the Legislature has thought fit to require an order of the Court to be obtained under the circumstances which existed here before he could be sued. I think the creditors who obtained the order could not afterwards alter the circumstances to the defendant's disadvantage by buying up other claims.

The appeal should, therefore, be allowed as to this part of it, and the plaintiff's recovery should be confined to the creditors' own debt.

Appeal allowed in part.

THOMPSON v. SMITH.

Will—Construction—"My Lawful Heirs"—Period of Ascertainment.

The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will.

Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to the residue.

Re Ford, Patten v. *Sparks*, 72 L. T. N. S. 5, applied.

Judgment of BOYD, C., 25 O. R. 652, reversed.

Statement.

THIS was an appeal by the defendant from the judgment of BOYD, C., reported 25 O. R. 652.

The action was brought for the construction of the will of Charles Palmer Thompson, and the following were the material portions of the will:—

"I further will and desire that the profits of and the interest in any the residue of the property or estate, real or personal, that I may be possessed of at the time of my decease shall be enjoyed solely by my beloved wife Lissy Thompson and my beloved daughter Mary Anna Thompson, the profits and interest thereof and therein to be equally divided share and share alike between my said beloved wife Lissy Thompson and my said beloved daughter Mary Anna Thompson during their natural lives.

"I do further will and desire that in the event of the death of either of the above named Lissy Thompson or Mary Anna Thompson the residue of my property, real or personal, shall be enjoyed by and go to the benefit of the survivor.

"I do further will and desire that at the decease of both the said Lissy Thompson and Mary Anna Thompson the said residue of my real and personal property shall be enjoyed and go to the benefit of my lawful heirs, and in order to carry out my desires and for the accomplishment of this my last will and testament I hereby constitute and appoint * * my executors."

Statement. The will was made on the 12th of July, 1853, and Thompson died on the 4th of August, 1853. He left him surviving his widow Lissy Thompson and his daughter Mary Anna Thompson, and a brother William Harte Thompson. Lissy Thompson died on the 10th of August, 1878.

Mary Anna Thompson married the defendant on the 27th of June, 1867, and died on the 30th of December, 1893, having first made a will in his favour.

The action was brought by the children of William Harte Thompson, who contended that the daughter took only a life interest, and the learned Chancellor decided in their favour.

The appeal was argued before HAGARTY, C.J.O., BURTON, and OSLER, JJ.A., and STREET, J., on the 4th of December, 1895.

Moss, Q.C., and *MacTavish*, Q.C., for the appellant. The daughter took the residue as the testator's heir. Some important cases were not brought to the notice of the learned Chancellor, and others upon the point have been decided since this case was before him: *Mortimore* v. *Mortimore*, 4 App. Cas. 448; *Mays* v. *Carroll*, 14 O. R. 699; *Bullock* v. *Downes*, 9 H. L. C. 1; *Re Nash*, *Prall* v. *Bevan*, 71 L. T. N. S. 5; *Re Ford*, *Patten* v. *Sparks*, 72 L. T. N. S. 5; *Brabant* v. *Lalonde*, 26 O. R. 379. The learned Chancellor relies on *Miller* v. *Eaton*, G. Coop. 272, and *Jones* v. *Colbeck*, 8 Ves. 38. But *Miller* v. *Eaton* is disposed of by *Re Ford*, in which it is spoken of as an erratic case. *Jones* v. *Colbeck*, has been much criticised, and is at any rate distinguishable. The word "relations" was used there. *Clark* v. *Hayne*, 42 Ch. D. 529, also referred to, was the case of a settlement, and is of no application here. There were plain words there fixing the date of ascertainment.

William Wyld, for the respondents. The general rule is as stated by the appellant, but this case contains the necessary elements of distinction, for here there are clear

expressions of a contrary intention. The testator was on his death bed, and had but one child, and hence in using the words "lawful heirs," it is clear he was referring to persons to take after the life estate. Argument.

Moss, Q. C., in reply.

January 14th, 1896. HAGARTY, C. J. O. :—

The only question is as to who answered the description of "my lawful heirs."

I think it is only necessary to refer to the late case of *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5, decided in January, 1895, only a month after the learned Chancellor's decision.

It very fully reviews the law, considering that the decision of the Lords in *Bullock* v. *Downes*, 9 H. L. C. 1, in 1860, had fully settled the principle that "my right heirs" must mean the heirs at the time of the testator's death, unless a contrary view was apparent on the will, and that the fact of a full provision being made in the will for the person answering the description of heir at his death, made no difference.

The case in the Lords was not cited to the learned Chancellor.

The present case is free from all difficulty such as is suggested in *Jones* v. *Colbeck*, 8 Ves. 38.

I also refer to my learned brother Street's judgment in *Brabant* v. *Lalonde*, 26 O. R. 379, and the authorities referred to by him.

The appeal must be allowed and the plaintiffs' action dismissed.

OSLER, J. A. :—

I see no substantial difference between the clause of the will which we have to construe in this case, and that which was before the Court of Appeal in England in the recent case (decided since the judgment now in question was

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given) of *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5. There, there were specific devises to trustees upon trust for each of the testator's four daughters successively for their lives, and for their respective children, with similar gifts over, and in default of any of his children leaving a child or children to his (the testator's) "own right heirs and next of kin according to the nature of the said property." It was held that the class to take under the ultimate trust must be ascertained at the death of the testator, and not at the period fixed by the will for distribution. The testator's daughters were therefore held to be his heirs and next of kin, the survivor, in the events that happened, taking the whole with the right to dispose of it by her will to the exclusion of the representatives of the other daughters.

In our case the testator devises to his wife, and only daughter and child, for their joint lives and the life of the survivor, and then further devises thus: "I do further will and desire that at the decease of both the said Lissy Thompson (the wife) and Mary Anna Thompson (the daughter), the said residue of my said real and personal property shall be enjoyed and go to the benefit of my lawful heirs." At the date of his death his daughter was his lawful heir. At the date of his daughter's death the plaintiffs, the children of a deceased brother, would be his heirs, his daughter having died childless, but having devised the property in question to her husband, the defendant. There is no controlling context, and applying the rule of construction established in *Bullock* v. *Downes*, 9 H. L. C. 1, followed in *Mortimore* v. *Mortimore*, 4 App. Cas. 448, and *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5, the testator's language must be taken to refer to those who are his heirs at his death, and not to those who may happen to answer that description at the determination of the preceding particular interest, even though the person taking as heir was the person or one of the persons entitled to the particular interest. His daughter then being his heir her power to devise the remainder after the determination of the life

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estate cannot be questioned. It is, indeed, just what happened in *Re Ford*, and her devisee, as the devisee of the last surviving daughter in that case, is entitled to the property to the exclusion of those who would have been the right heirs of the testator if that class were to be sought for and ascertained at the date of his daughter's death instead of his own.

I refer also to the case of *Brabant* v. *Lalonde*, 26 O. R. 379, where the question is fully considered by my brother Street.

The appeal must therefore be allowed.

BURTON, J. A., and STREET, J., concurred.

Appeal allowed.

JONES v. GODSON.

Arbitration and Award—Arbitrator's Fees—Penalty—R. S. O. ch. 53, sec. 29.

An arbitrator is not brought within the punitive provisions of section 29 R. S. O. ch. 53, when the payment of the alleged excessive fees is made by cheque to an agent who has authority to accept money only, and the arbitrator refuses to take the cheque.

Per OSLER, J. A.—In order to fix an arbitrator with the penalty there must after the expiration of the time named be either a demand upon him to make, execute, and deliver the award and a refusal to do so unless a larger sum is paid for fees than is permitted by the Act; or actual payment of such larger sum.

Per MACLENNAN, J. A.—The person desiring to take up the award may either have the fees taxed and then tender the amount, or he may pay the amount demanded and bring action for the penalty, which is a sum equal to treble the excess demanded and not equal to treble the whole amount of the fees demanded.

Judgment of the Common Pleas Division, 25 O. R. 444, affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 25 O. R. 444.

The action was brought against arbitrators to recover treble the amount of fees alleged to have been paid to them, and an appeal from the judgment of the Common Pleas Division dismissing the action, was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th and 29th of November, 1895. The appellant asked leave to put in further evidence.

The facts and arguments are stated in the report in the Court below.

W. R. Smyth, for the appellant.

W. Nesbitt, and *A. Monro Grier*, for the respondents.

The following cases, in addition to those mentioned in the report below, were cited as to payment by cheque: *Hughes* v. *Canada Permanent Loan and Savings Society*, 39 U. C. R. 221; *Boyd* v. *Nasmith*, 17 O. R. 40; *Bickford* v. *First National Bank*, 42 Ill. 238; *Brown* v. *Leckie*, 43 Ill. 497.

January 14th, 1896. OSLER, J. A. :— Judgment. OSLER, J.A.

I am of opinion that we should dismiss the appeal. I think that in order to fix an arbitrator with the penalty, it is at least necessary that after the expiration of the time named in the section, there should have been a demand upon the arbitrator to make, execute, and (or) deliver the award, and a refusal to do so until a larger sum should be paid for his fees than is permitted by the Act; or if it is sought to recover the penalty by reason of his having actually received a larger sum for fees than the Act permits, then the fact of such payment to the arbitrator or his duly authorized agent, must be clearly proved. This action fails in both respects, for there was no such demand as I think the section requires, nor was there an actual payment of the fees. It is not proved that Mr. Jennings was authorized to take a cheque marked or not marked, or anything but "good money." Had the bank on which the cheque was drawn, failed before it was cashed, I do not see how Mr. Jennings could have justified the delivery of the award: *Papé* v. *Westacott*, [1894] 1 Q. B. 272. It seems, moreover, that the cheque has actually been returned to the drawer, and is said to have been destroyed.

I do not wish to be understood as saying that there may not be other difficulties in the plaintiff's way. The section is not an easy one to construe, and I express no further opinion upon it.

As to the further evidence which it was sought to introduce in the Divisional Court, and here, I may say, that no case has been made out for granting indulgence. There was no miscarriage at the trial, nor any complaint there or in the Court below of non-reception of the evidence. It was not even formally tendered, and what was said about it there was after the close of the case, when it was clearly in the direction of the learned trial Judge to admit or reject it; a discretion the exercise of which we would not lightly interfere with. The application comes now as an application for indulgence, and

Judgment.

OSLER, J.A.

in an action of this kind, an action for penalties, while the plaintiff is entitled to "all justice," appeals for indulgence are not usually regarded with favour.

HAGARTY, C. J. O., and BURTON, J. A., concurred in the result.

MACLENNAN, J. A. :—

This action is to recover the penalty imposed by the statute, R. S. O. ch. 53, sec. 29, upon arbitrators for refusal or delay to deliver an award until a larger sum is paid than is permitted by the Act. Mr. Smyth has said everything that could well be said in support of his appeal, but I think he has not succeeded in shewing that the judgment is wrong in dismissing the action.

The meaning of section 29 is pretty plain. It must be construed in the light of the four sections which precede it. Those sections enable any party to an arbitration to have the costs thereof taxed. The taxing officer has a discretion to allow fees between a maximum and minimum amount prescribed by the Act, having regard to the length of the arbitration, the value of the matter in dispute, and the difficulty of the questions to be decided ; and he may also allow a reasonable sum for the preparation and drawing up of the award. Then comes the section in question, and what it means, I think, is this. If the party desiring to take up the award, thinks the amount claimed for costs excessive, he may have the bill taxed. He may then demand the award, offering to pay the sum allowed on taxation. If a larger sum is still demanded, and there is refusal or delay, he may at once bring action for the penalty. But if it is very important to him to have the award at once, he may pay the sum demanded, and bring his action for a penalty equal to treble the excess. It is evident that the sum which the Act permits to be received by the arbitrators as fees, can only be ascertained by taxation ; and the Legislature could never have intended that

if it turned out upon taxation that the fees claimed by arbitrators in any case before the award would be delivered up, were a dollar or two more than was allowed, they should be penalised in a sum equal to three times the whole bill. It think it is clear such was not the intention of the Legislature, and that such is not the meaning of the section; and, therefore, even if there had been a demand and refusal or delay, or actual payment as contended, the plaintiff must have failed in his action.

Judgment. MACLENNAN, J.A.

The appeal should be dismissed.

Appeal dismissed.

CONNOLLY V. COON.

Landlord and Tenant—Lease—Breach by Tenant—Repudiation of Contract—Damages.

When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot, on the principle that there has been a repudiation of the contract, at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due.

Hochster v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 7 Exch. 111, considered.

Judgment of the County Court of Middlesex reversed.

Statement.

THIS was an appeal by the defendant from the judgment of the County Court of Middlesex.

The plaintiffs were the owners of certain houses in the city of London, and on the 9th of July, 1894, leased by oral agreement one of the houses to the defendant at the rental of $14.50 per month. The defendant went into possession and remained in possession for five months, and paid four months' rent in advance. Prior to the end of the four months he gave notice in writing to the plaintiffs' agent that he intended to leave the house at the expiration of another month. At the expiration of the fifth

Statement. month he came to the plaintiffs' agent and paid the month's rent and gave up the key. The plaintiffs' agent told him that he was a tenant for a year, and that he could not give up the house until his year expired. He denied being a tenant for a year, and insisted that he was a tenant only from month to month, and had a right to give up possession and terminate the tenancy on giving a month's notice. The five months expired on the 8th of December, 1894, and on the 20th of December, 1894, the plaintiffs brought this action against the defendant claiming $101.50 for seven months' rent, and $200 damages for breach of contract.

The action was tried at London on the 6th of July, 1895, before His Honour Judge Edward Elliott, who held that there was a tenancy for a year, and he assessed the damages up to the date of the trial at the amount of the rent to that date.

It was proved that the plaintiffs could have leased the house to another tenant at a rental of $12 a month, but had refused to do so on the ground that the rentals of the adjoining houses would have been affected.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 19th and 20th of November, 1895.

Magee, Q. C., for the appellant. There was no right of action here. No rent was due, and there was no breach. The term was still existing. It is not like *Hochster* v. *De la Tour*, 2 E. & B. 678, relied on by the learned Judge. That turned on the implied obligation to continue the contractual relation where the contract is executory. There is no case where the doctrine has been applied where the person bringing the action has nothing further to do, and is in no danger of incurring unnecessary expense, or being put to loss. Here the contract was complete on the plaintiffs' side, and there was no possible inconvenience

Argument.

from the defendant's giving notice of intention not to continue the relationship any further, and no reason to invoke the doctrine of acceleration of remedy. *Hochster* v. *De la Tour*, 2 E. & B. 678, has frequently been criticised: *Daniels* v. *Newton*, 114 Mass. 530; *Frost* v. *Knight*, L. R. 7 Exch. 111; *Johnstone* v. *Milling*, 16 Q. B. D. 460. Here the plaintiffs are in fact suing for rent, and thus relying on the contract, and they cannot do this: *McLellan* v. *Winston*, 12 O. R. 431; *Thompson* v. *Smith*, 21 C. P. 1; *Cort* v. *Ambergate R. W. Co.*, 17 Q. B. 127. In *Phillpotts* v. *Evans*, 5 M. & W. 475, it is pointed out that the refusal must be adopted as a breach. In any view the damages are excessive. The whole rent has been allowed, treating, as it were, the term as existing, and yet at an end. Treated as damages the evidence is clear that the plaintiffs could have obtained another tenant and should have done so.

N. W. Rowell, for the respondent. The defendant repudiated his tenancy, and the plaintiffs assented, and this was sufficient to put an end to the tenancy, and the right of action at once arose. There was a total repudiation: *Johnstone* v. *Milling*, 16 Q. B. D. 460; *Grau* v. *McVicker*, 8 Bissell 13. The principle is not limited to executory contracts. At any rate this is not an executed contract even on the plaintiffs' side. They were liable to give quiet enjoyment, and this was a burden that they were not bound to rest under till the expiration of the term. Moreover, there was the danger of fire and dilapidation. The inaptness of the pleading should not prejudice the plaintiffs: *Dalrymple* v. *Scott*, 19 A. R. 477, at p. 495. Even if it be held that what took place amounted to a surrender, that would not necessarily deprive the plaintiffs of their right of action, for the breach complained of took place prior to the surrender, and the claim for damages would not by the surrender be lost. There was not a surrender but a rescission, with a reservation of the claim to damages: *Johnstone* v. *Milling*, 16 Q. B. D. 460; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434; *Synge* v.

Argument. *Synge*, 9 Rep. 265; *Danube and Black Sea Co.* v. *Xenos*, 13 C. B. N. S. 825. The quantum of damages is right: Mayne, 3rd ed., p. 86; Sedgwick, 8th ed., p. 328, *et seq.* It was proper to assess the damages up to the time of the trial: Consol. Rule, 680; and the tenant cannot complain: *Joyner* v. *Weeks*, [1891] 2 Q. B. 31.

Magee, Q. C., in reply.

January 14th, 1896. HAGARTY, C. J. O.:—

In whatever form we view this action it must be considered as substantially a claim for rent on a tenancy for a year. As such it is very difficult to support the claim.

There is an admitted tenancy for a year. The defendant says he will leave and does leave. The landlord expressly refuses to accept a surrender.

There is so far no surrender either under the Statute of Frauds or by operation of law.

The landlord would do no act shewing acceptance, and left the premises vacant as they remained at the end of the year.

During the remaining seven months the term continued, and the tenant could during that time have resumed possession.

I do not see how, granting the continuance of the term, the landlord could make any claim except from month to month, as time went on. He could at any time by entry and resuming possession, or leasing to a new tenant, have produced a surrender by operation of law. But so long as he chose to leave the term unsurrendered and existing, I cannot see how he can maintain an action like this while seven months of the term remained.

The defendant's expressly renouncing and repudiating the tenancy cannot in itself be a surrender, and the term remains.

Mr. Rowell ingeniously tried to shew that this is merely a claim for damages for the defendant's act. That act was simply that he told his landlord he would leave, and not pay a year's rent.

Judgment.

HAGARTY, C.J.O.

I cannot see that any sound argument deducible from such cases as *Hochster* v. *De la Tour*, 2 E. & B. 678, can govern the case before us.

I think the appeal must be allowed, and the action dismissed in the Court below.

BURTON, J. A.:—

I am of the same opinion.

OSLER, J. A.:—

I am also of opinion that the appeal must be allowed. There has been no surrender in law or otherwise of the lease under which the defendant holds the property. He was tenant for a year. He was in possession, and nothing that he did by way of going out of possession, returning the key of the house to his landlord's agent, and declaring that he would pay no more rent, had the effect of putting an end to the term. He remained tenant, and though not bound to remain in actual possession, might have resumed possession whenever he pleased. It would be a most extraordinary extension of the doctrine of *Hochster* v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 7 Exch. 111; and cognate cases, were it to be held that because the tenant chose to say that he repudiated the lease and would pay no more rent, the landlord might forthwith bring his action and recover damages measured by the amount of the future gales of rent, treating what had occurred as an immediate breach of the entire contract between his tenant and himself. It might as well be said that the announcement by the maker of a promissory note, or of a covenant to pay a sum of money at a future time, that he would never pay it, or would refuse to pay it when due, would give rise to an immediate cause of action. Where the contract is not wholly executory, as in the case before us, and the illustrations I have mentioned, the principle on which the above cases were decided does not

Judgment.

OSLER, J.A.

apply. In those cases, as Field, J., put it in *Société Générale de Paris* v. *Milders*, 49 L. T. N. S. 55, "Everything was executory, nothing had been done except the contract and the parties were waiting." So it was in *Danube and Black Sea Co.* v. *Xenos* 13 C. B. N. S. 825. In cases like *Honck* v. *Muller*, 7 Q. B. D. 92; *Mersea Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434; where the point arises, the question is, whether the contract is a divisible one.

The case of *Grau* v. *McVicker*, 8 Bissell 13, cited by Mr. Rowell, comes nearest the present case in its circumstances. It seems well decided, but the vital distinction between them is that there the agreement was to accept a lease of certain premises in the future for a term of two weeks. The intended lessee never entered (see *Coe* v. *Clay*, 5 Bing. 429), and before the time arrived for taking the premises gave notice to the intended lessor that he would not take or occupy them according to the agreement. The agreement was strictly executory on both sides, and a claim by the intended lessee for damages before the time when the lease was commenced was entirely within the principle of the English authorities cited.

I refer also to *Johnstone* v. *Milling*, 16 Q. B. D. 460; *Dingley* v. *Oler*, 117 U. S. 490; *Daniels* v. *Newton*, 114 Mass. 530, an agreement to purchase land within a definite time; Anson on Contracts, 9th ed., p. 290.

The judgment must be reversed.

MACLENNAN, J. A.:—

I am of opinion that this appeal should be allowed, and the action dismissed.

The learned Judge has found that there was a demise by the plaintiffs to the defendant for a year, at a rent of $14.50 per month, and that the defendant entered and paid rent for four months; that the defendant claimed to be a monthly tenant only, gave up the key and went out of possession. The plaintiffs, however, did not accept a surrender of the premises, insisting that the demise was for a

Judgment.

MACLENNAN, J.A.

year. The defendant continuing to insist that he was only a monthly tenant, and having given a month's notice to quit, the plaintiffs treated that as a repudiation of the contract of tenancy, and brought this action before any more rent accrued, relying on the principle of the decision in *Hochster* v. *De la Tour*, 2 E. & B. 678.

With great deference I am clear that the present is not governed by that case, but is quite different. The defendant had received the thing for which he had agreed to make the monthly payments. The term had vested in him. He could occupy the house or not, as he pleased. He could keep it vacant and lock it up, but it was still his, and whether he occupied it or not was no concern of the plaintiffs. As long as he continued to pay his rent he was guilty of no breach of contract. Mere repudiation was no breach, and gave the plaintiffs no cause of action.

Appeal allowed.

ARGLES v. MCMATH.

Landlord and Tenant—Fixtures—Short Forms of Leases Act, R. S. O. ch. 106—Forfeiture.

A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purposes of his business, even though they are fastened to the building, provided, however, the removal can be effected without substantial injury, and the covenant in the Short Forms of Leases Act, R. S. O. ch. 106, to leave the premises in repair, does not restrict this right.

Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed after the election to forfeit.

Judgment of the Queen's Bench Division, 26 O. R. 224, affirmed.

Statement. THIS was an appeal by the defendant from the judgment of the Queen's Bench Division, reported 26 O. R. 224, where the facts and arguments are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 18th and 19th of November, 1895.

W. Macdonald, for the appellant.
Shepley, Q. C., for the respondent.

January 14th, 1896. HAGARTY, C. J. O.:—

The tenant assigned to the plaintiff on the 5th of February, 1894, all his stock-in-trade, chattels and fixtures, but not the term unless accepted by the trustee in writing. The current quarter would expire on the 1st of April.

On the 2nd of March, the defendant, the landlord gave notice of forfeiture.

I need not go over all the evidence as to the assignee taking possession, and the landlord entering and re-entering. Up to that time the plaintiff was in possession.

On the 1st of March the plaintiff's agent and the defendant had an interview. The defendant positively refused to let anything be taken away, and asserted his right to the whole.

On the 6th of March there was again an altercation, the

Judgment.

HAGARTY, C.J.O.

plaintiff still in possession. The defendant, after much heated discussion, again refused to let anything go, even to carpets and curtains. The plaintiff's agent had the key of the premises. Two or three days after the agent Lorsch returned to remove the articles and fixtures claimed under the assignment. He found the place barricaded up by boards, etc., placed there by a carpenter employed by the defendant, who had managed to enter by means of a cellar door.

Lorsch went to the defendant, who refused to allow him to enter or to remove anything.

If the plaintiff, representing the tenant, had the right to these goods and fixtures, notwithstanding the determination of the term by forfeiture, at all events while the tenant was in actual possession, I think the evidence is ample to make the defendant answerable for the value of the goods illegally detained by him.

A perusal of the evidence and of the numerous authorities cited in the very elaborate and careful judgment in the Court below has led me to the opinion that the Divisional Court has, on the whole, taken the right view as to the assignee's rights both as to fixtures and loose chattels.

There was a direct interference with the plaintiff's rights while the term was still in existence before the landlord's notice of election to forfeit. The tenant was still in possession, and could lawfully have taken all away that day.

On the next day, when the notice was received, the possession still remained, and I think he could that day have lawfully removed the things. He was again prevented from taking anything, although loose articles, not fixtures, chairs, carpets, etc., were there.

As far as I can understand the very numerous cases cited in argument and in the judgments below, I think there has been a strong tendency in the Courts to favour and not to contract the tenant's right to what may be called "trade fixtures," things put up for the purposes of the business carried on ; fastened to the building, but so as to be readily removed without substantial injury.

Judgment.

HAGARTY, C.J.O.

As to the time for removal, it has been variously decided, but I think, on the whole, at all events when the determination of the tenancy as here depended on an uncertain event, and the actual possession remained, that the removal may take place, after the notice, as it might here have done, but for the landlord's positive intervention.

The latest case bearing on this point was decided after the Divisional Court decision, *Barff* v. *Probyn*, 11 Times L. R. 467, more fully reported in 73 L. T. N. S. 118, before Mr. Justice Charles in last June. He reviews the authorities, and holds that where a tenancy expired by effluxion of time on the 29th of September, and the landlord had demanded possession, the tenant refused to leave on the pretence that the incoming tenant had agreed to take his fixtures, but had not paid.

On the 27th of October the landlord served the writ of ejectment. The tenant defended, and judgment was obtained on the 16th of March following. He had removed fixtures before he gave up possession on that day.

Charles, J., says: "The inference of fact which I draw is, that at the time the defendant removed the fixtures the relation of landlord and tenant did not exist, that he was in fact a trespasser, and was so treated by the landlords when they served upon him the writ of ejectment on the 27th October. After that date certainly the defendant could not consider himself a tenant, and therefore his case would come within the limitation laid down by Alderson, B., in *Weeton* v. *Woodcock*, 7 M. & W. 14: 'During such further period of possession by the tenant as he holds the premises under a right still to consider himself as tenant.'" He therefore refused to apply *Penton* v. *Robart*, 2 East 88, to the case.

I think our case differs widely from *Barff* v. *Probyn*, and that the judgment there cannot be properly relied on in the different circumstances before us.

I am unable to adopt the construction placed on our Short Forms of Leases Act by the learned Chancellor, and I adopt the view of the Divisional Court.

Judgment.

HAGARTY, C.J.O.

The short covenant as extended is to yield up the premises "together with all buildings, erections and fixtures thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted."

The view that the decision made all the tenant's fixtures irremoveable and to be kept in repair, seems to have caused the Legislature last session to correct the injustice by inserting after the word "fixtures" the words "erected or made by the lessor."

I consider that the then existing statute should not be construed as the defendant urges.

Reading all the words in the extended clause I think the language "*reddendo singula singulis*" refers only to what the lease demised of the landlord's property, real and personal, and not to property in the nature of fixtures put there by the tenant possibly for a mere temporary user of the premises, or generally for the convenience or benefit of the trade carried on.

Unless the language had been much clearer and more express I cannot bring myself to believe that such positive injustice could have been intended, and a construction so opposed to the general understanding of those concerned in the dealings between landlord and tenant.

As already said, I think the fixtures spoken of in the clause mean fixtures existing in or part, as it were, of the demised premises.

As to any fixtures afterwards put in by the landlord, in the absence of agreement to the contrary, they could not be removed by the tenant.

I see no legal bar to the plaintiff's recovery, and I think the judgment of the Divisional Court is right.

On the general merits, and on the law as to the character and removeability of the fixtures of the tenant, I agree with the judgment appealed from.

The option given to the defendant to return the goods in good order, etc., fairly protects his interests as to value.

Judgment.

BURTON, J.A.

BURTON, J. A. :—

The distinction between landlord's fixtures and tenant's fixtures had been established by a long line of decisions before the passing of the Act respecting Short Forms of Leases, and there can be no question that it was not intended to effect any change in the law respecting fixtures or the respective rights of landlords and tenants with respect to them by that Act, which was passed simply to substitute a short form of lease for that in general use at the time ; and the question is, what is the proper interpretation of the word "fixtures" as used in the covenant to surrender the premises in good repair. All the articles in question in this case were what are known as tenant's fixtures ; that is to say, personal chattels annexed to the freehold by the tenant during the term for the purposes of his trade, and which he has a right to sever and remove during the term in the absence of any express stipulation to the contrary. Being chattels of this description, is there anything in this covenant to interfere with that right, or is it not more reasonable to construe it as applying to landlord's fixtures, which stand in the same position as the building themselves ? Were it otherwise it is very difficult to believe that under the covenant in question, which was in general use—I had almost said for centuries before the Act in question—the point would not have arisen, as the right to remove had during the same period been exercised by the tenant.

The word has a twofold signification, and giving it that which I think is the correct one, it does no injustice ; placing the other upon it would not only work great injustice, but would be revolutionizing and reversing the well established law of the land.

I agree, therefore, with the reasoning of the Chief Justice of the Queen's Bench, as I do also with his conclusion, that under the circumstances the tenant had not forfeited his right.

I think, therefore, that the appeal should be dismissed.

OSLER, J. A. :—

I agree.

MACLENNAN, J. A. :— Judgment.

MACLENNAN, J.A.

I think that this appeal fails. I agree in the judgment of the learned Chief Justice of the Queen's Bench Division, and in the reasons which he has so elaborately given therefor.

All the articles in question, so far as they were affixed to the freehold, were so affixed for the purposes of the tenant's trade, and were, therefore, trade fixtures, as to which it has long been settled that at common law the tenant had a right to remove them at the end of the term. The question then arises whether they are within the covenant to surrender and yield them up at the end of the term. The language of the covenant to repair is different from the covenant in question, and it is express with regard to fixtures and things which might be erected during the term. The latter covenant merely says the demised premises "with the appurtenances, together with all buildings, erections and fixtures thereon," there being no words pointing to or indicating any time at which the fixtures referred to had been made. Now it is evident that the object and purpose of this covenant is to insure that at the end of the term everything shall be in good repair. It required no covenant to oblige the tenant to surrender and yield up, or to do that peaceably. That was his obligation independently of covenant, but his covenant requires him to yield everything up in repair. The appellant's contention would require us to hold that the covenant meant a great deal more; that it means to say that the tenant is not only to deliver up the buildings, erections and fixtures which were on the land when at the time of the demise, and which by law he was obliged to deliver up, but also his trade fixtures which by law were his own, and which by law he could remove. To my mind the natural obvious meaning of the covenant is that the "buildings, erections and fixtures thereon," are only such as were thereon at the time of the demise, and which were the property of the landlord. If the parties

Judgment.

MACLENNAN, J.A.

had intended that the tenant's property should pass to and belong to the landlord, that would have been distinctly expressed, as was stated by Lord Justice Turner in the case cited by the learned Chief Justice: A lease ought not to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels, unless such an intention is clearly expressed: *Duke of Beaufort* v. *Bates*, 3 DeG. F. & J. 381, 390.

I am, therefore, clearly of opinion that the judgment is right in holding that the covenant does not extend to the tenant's trade fixtures.

I think, too, that the learned Chief Justice has shewn that in a case like the present the tenant had a reasonable time to remove his fixtures after the landlord elected to enforce the forfeiture.

The appeal should, therefore, in my opinion, be dismissed.

Appeal dismissed.

MEHARG V. LUMBERS.

Bankruptcy and Insolvency—Assignments and Preferences—Assignment of Book Debts—Account—R. S. O. ch. 124, sec. 8.

When an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected by him under the preferential security before the attack upon it.

Judgment of the Common Pleas Division affirmed.

Statement.

THIS was an appeal by the defendant Lumbers from the judgment of the Common Pleas Division.

The defendant Rolling, who was a shopkeeper, on the 7th of October, 1893, made an assignment of his book debts to the defendant Lumbers, a wholesale grocer, as collateral security for his indebtedness to the latter.

On the 21st of October, 1893, Rolling made an assignment for the benefit of creditors, pursuant to the provisions of R. S. O. ch. 124, to the plaintiff Meharg. Upon the refusal of Meharg to attack the assignment of book debts, John Macdonald & Co., who were creditors of Rolling, obtained an order under the Act allowing them to bring an action in his name, and this action was thereupon brought, John Macdonald & Co. being joined as plaintiffs suing on behalf of themselves and all other creditors of Rolling.

The action was tried at Toronto, on the 10th of February, 1894, before MACMAHON, J., who found that Rolling was insolvent when he gave the security; that Lumbers knew that he was insolvent; and that the assignment was made with intent to prefer Lumbers, and he gave judgment in the plaintiffs' favour. Pressure was proved, but this was held to be no answer to the claim.

This judgment was affirmed by the Common Pleas Division (MEREDITH, C. J., and ROSE, J.), the judgment of the Court being delivered, as follows, on the 31st of December, 1894, by

Judgment. MEREDITH, C. J.:—

MEREDITH, C.J.

The defendant contends that the findings are not supported by the evidence; that the presumption as to the intent arising from the fact of the assignment having been made within sixty days after the transaction, was rebutted, and that the proper conclusion from the evidence was that the transfer was not made with the intent of preferring the defendant, but in pursuance of an agreement entered into between him and the assignor by which the latter was to give the security upon the promise of the defendant to continue to supply him with goods for the purpose of his business as he had theretofore done.

I am of opinion that the conclusions of fact of the learned Judge are supported by the evidence, and ought not to be disturbed. The insolvency of the assignor was not disputed, and there was evidence that facts which were entirely inconsistent with his solvency were known to both the assignor and the defendant, and that the object of the transfer of the book debts was to secure the defendant's debt in the event of other creditors pressing their claims, the result of which, it was feared, would be that nothing would be left to meet the defendant's claim unless the security were obtained.

The effect of the finding as to the intent, is to negative the contention of the defendant that the transfer was made in pursuance of the agreement to give the security in order to obtain the additional credit which was said to have been promised by the defendant; that finding may, as I have said, be supported upon the evidence, and I cannot say, having regard to the somewhat unsatisfactory nature of the evidence, as to what the agreement really was, that the learned Judge was not justified in refusing to accept the evidence of it as sufficient to rebut the presumption arising under the statute.

The case of *Lawson* v. *McGeoch*, 20 A. R. 464, establishes that in cases to which 54 Vict. ch 20, sec 1, sub-sec. 2 (*b*) applies, the onus of rebutting the presumption of intent to

prefer, rests upon the person supporting the impeached transaction, and that pressure alone at all events cannot be relied on to rebut it.

In cases such as this, where the effect of the evidence depends so much on the demeanour of the witnesses, and the manner in which their testimony is given, we ought not, I think, to interfere with the findings of the Judge before whom the witnesses have been examined, and who is, therefore, in a much better position to give to the evidence its proper value than we are, unless we can see plainly that he has come to a wrong conclusion, and that I am unable to say in this case.

The defendant further contended that if the transfer were set aside the plaintiff was not entitled to an account of the moneys collected between the date of the making of it and the giving of the undertaking to account which was given on the motion for injunction to restrain the defendant from getting in the book debts, which was made by the plaintiff; and in support of this contention he cited and relied on *Stuart* v. *Tremain*, 3 O. R. 190, and the cases which have been decided on the rule laid down in that case.

I do not think that these cases are applicable; they were all actions by creditors who had not obtained judgment and execution and proceeded upon the ground that the creditor had no lien upon the goods and no execution affecting them when the transfer to the *bonâ fide* purchaser was made which was exigible in execution, and therefore, as was said by the Chancellor in the case referred to, his pursuit of the goods exigible in execution fails when a *bonâ fide* sale takes place.

Here the plaintiff is the assignee for the benefit of creditors, and the effect of the assignment was to vest in him, for equal distribution among them all, the real and personal estate, rights, property, credits and effects whether vested or contingent belonging at the time of the assignment to the assignor, except such as were by law exempt from seizure or sale under execution.

The effect of the setting aside of the assignment of the

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MEREDITH, C.J.

book debts in this case is that the assignment becomes, and is, utterly void, and that being so, it follows that the moneys collected by the defendant are the proceeds of part of the property vested in the assignee by force of the assignment, and he is entitled to treat the defendant as holding them in trust for him, and it was upon this principle that the Supreme Court proceeded in the case of *McCall* v. *McDonald*, 13 S. C. R. 247.

If there had been no transfer of the book debts to the defendant, and he had collected them wrongfully, the assignee might have sued him for the amount which he had collected as for money had and received to his use. The transfer having been set aside, and being therefore utterly void as against the plaintiff, the defendant, in my opinion, stands in no better position than that of a wrongdoer; he cannot set up the transfer against the assignee, and must account for all the moneys which have been collected.

It is unnecessary, in the view which I have taken, to consider the effect of section 8 of the Act, R. S. O. ch. 124.

The appeal in my opinion fails, and must be dismissed.

The defendant Lumbers appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 8th of November, 1895.

Moss, Q. C., for the appellant. The impeached transaction was entered into in good faith, and without any fraudulent intent on the part of the appellant or of Rolling, or any knowledge on the part of the appellant of the insolvency of Rolling at the time of the impeached transaction. It is not proved that there was any intent on the part of Rolling to give to the appellant, or on the part of the appellant to obtain, an unjust preference over the other creditors of Rolling. In any event no account should have been directed of the moneys collected between the dates of the assignment and of the undertaking to account given on the motion for injunction made by the

respondents. The assignment in question was not void, but at most voidable, and took and had its full and proper legal effect until set aside, and all acts done under it were valid and binding. At the time of the assignment by Rolling to Meharg, all that passed was such property as was then vested in Rolling, and as the book debts in question were not at that date vested in him, the assignment did not transfer the book debts to Meharg. At most the effect of the assignment was to vest a right of action, which might or might not be exercised, and until exercised and made available, all acts done with regard to the property were legal and valid. The case of *McCall* v. *McDonald*, 13 S. C. R. 247, has no application to this case. The circumstances were entirely different. There, by agreement of all parties, the goods comprised in the impeached chattel mortgage were sold, and the proceeds paid into Court to abide the result of the action, and the question before the Court there was as to the mode of distribution of the fund amongst the creditors, the proceeds being held in the same manner as the goods would have been held if they had still remained in the possession of the grantee under the mortgage, and had been sold after the impeached mortgage had been declared void. Apart from statute, it is clear that no right to require an account from the grantee of a property exists in favour of the creditor or other person impeaching the grant, and there is no statutory provision giving such a right to persons occupying the position of the respondents in this action. Argument.

Shepley, Q. C., for the respondents. The transaction in question, apart from and without the finding that there were, on the part of Lumbers, both the knowledge of Rolling's insolvency and an intent to obtain a preference, is plainly within the provisions of the statute as amended. The statutory presumption has not been rebutted. Evidence of pressure is not sufficient: *Lawson* v. *McGeoch*, 20 A. R. 464, and a mere agreement by a creditor to supply to the debtor goods *in futuro* is not within the exceptions in section 3. Moreover, it is plain, upon the evidence, that

Argument.

no such agreement was made. The judgment of the Divisional Court upon the question of accounting proceeds upon the application of the principles laid down by the Supreme Court in *McCall* v. *McDonald*, 13 S. C. R. 247. Those principles fully apply to the present case. Here Meharg, the assignee for the benefit of creditors, had conveyed to him by the debtor the latter's whole estate, subject to a transfer of a portion of it, which, on the hypothesis, was void as against creditors, and has been properly so declared. As the statute now stands, in the assignee is exclusively vested the right to impeach the transfer in question. In *McCall* v. *McDonald* it was the creditor who brought the action, and as the law then stood an assignee could not have maintained it at all. Surely, if the result of an action successfully maintained by a creditor before 1885, where a general assignment had been made, was that the property covered by the conveyance successfully impeached "necessarily fell into the assignment," this result will not the less follow in a similar action brought after 1885, by the assignee himself, in whom the Act of that year exclusively vests the right of bringing such an action. The only cases in which it has been held that the proceeds of a sale by the grantee of the property covered by a conveyance void under the statute could not be followed are cases in which the attacking creditor had no lien upon the property. It has never been held that a creditor with an execution could not follow such proceeds, nor has it ever been held that an assignee, asserting the right given him by the statute, could not follow such proceeds. This is pointed out in the judgment appealed from. Then the plaintiff here is within the benefit of section 8 of R. S. O. ch. 124, which expressly enables the successful assignee-plaintiff, in an action of this character, "to recover the moneys or other proceeds realized," if the grantee has not the property in specie but has turned it into "moneys or other proceeds."

Moss, Q. C., in reply.

January 14th, 1896. HAGARTY, C. J. O.:— Judgment. HAGARTY, C.J.O.

On the question of fact I think the decisions of the Judge at the trial and of the Divisional Court are correct, and should be affirmed.

I think the Divisional Court properly held that the defendant was liable to refund the moneys collected by him on the assignment of the book debts.

The assignment may be good and binding as between the parties, but it is bad as against the rights of the creditors, and the assignee can avoid it under the statute, and I think can call on the preferred creditor to refund the moneys received thereunder.

It appears to me to fall clearly within sections 2 and 8 of R. S. O. ch. 124.

The defendant has "disposed of" the property, the subject of the impeached assignment, by applying for and receiving the moneys from the assignor's debtors, and if so, then the moneys realized therefrom may be recovered from him. Any other construction would defeat the object of the Act, and render it an easy matter to evade it by a rapid sale or disposal of property before the execution of a deed of assignment.

BURTON, J. A.:—

At the time that the transfer was made it was good, not only between the parties, but as to all the world. The debtor's power to deal with the property was absolute, and in the absence of some statute curtailing that power he could dispose of it either in satisfaction of debts, or in security for them. It is said that the power here was restricted, inasmuch as it has been found to be a fraudulent preference within the meaning of the Act respecting Assignments and Preferences by Insolvent Persons, which declares that any such transfer shall, as against creditors, be utterly void. It is not, however, necessary to cite authority that in such a case as the present the word

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BURTON, J.A.

"void" must be read "voidable," and till made void by a party entitled to avoid it, it is a valid transfer.

The difficulty arises from the special legislation to be found in section 8.

But for that I should have thought that the case of *Marks* v. *Feldman*, L. R. 5 Q. B. 275, very applicable to the present case, as that was a case which, although under the Bankruptcy Act, was one in which there was no relation back, and yet it was held that as the subject matter which was held to be a fraudulent preference could have been recovered, the proceeds might be recovered.

If the assignee's powers are not cut down in a case like the present by section 8, then I think there is great force in the contention that when avoided, the transfer became void *ab initio*, and that the proceeds being still in the hands of the transferee, he was bound to account for them.

But it is said that under section 8 the assignee is entitled to recover, and that I dispute.

I was of opinion, although overruled, that the Act was not intended to apply to book debts, and if I had seen this section it would have very strongly confirmed me in that view; if debts were intended to pass, it is difficult to see why those debts, when collected, should not also be recoverable by the assignee.

The Courts have held that they were within the Act, and what we have to consider is, whether as a matter of policy, with which we have nothing to do, the Legislature has not deliberately confined the assignee's powers to recover the proceeds to those cases, and those cases only, in which the transferee has "sold or disposed of" the property.

In the remarks I am about to make I must be understood as confining myself to the assignee's rights under that section.

It provides that if the person to whom any transfer under section 2 of the Act is mentioned shall have "sold or disposed" of the property which was the subject of

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such transfer, the moneys or other proceeds realized therefor may be recovered in any action as fully and effectually as the property if still remaining in the possession of such person could have been recovered.

As I have already said, if the Legislature never intended to include "book debts," the reason for the omission of any reference to money collected is obvious; but if that was their intention how can we say that it was not their deliberate intention to exclude any liability on the transferee's part to account for moneys rightfully received in the ordinary course before the transfer was avoided?

The person who framed that section had not present to his mind when using the word "property" such things as book debts, although I am not prepared to say that as they are now held to be within section 2 the proceeds would not be recoverable if they had been "sold or disposed of," but I protest against the Court legislating, which we should be doing, if we were to hold "sold and disposed of," to be equivalent to "collected or received."

The words in their ordinary grammatical sense refer to a parting with the property either by sale or other disposition for value; but it is difficult to understand how a man by keeping the money paid to him in his safe or at his bankers either sells or disposes of it.

The late Baron Parke, no mean authority, laid down this rule:

"The rule which the Courts have constantly acted upon of late years in construing Acts of Parliament is, to take the words in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity."

Another eminent writer uses this language:

"The current of authority at the present day is in favour of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct what

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BURTON, J.A.

they may deem either excesses or omissions in legislation."

And again: "If the Courts could give to phrases new, unusual, forced, or strained, interpretations; if they could insert a word here, or strike out a word there, all idea of conforming to the legislative intent would be lost, and cases turning on the construction of doubtful statutes would soon come to be decided either on judicial notions of policy, or on the peculiar equities of the particular matter in hand."

In the present case the statute is not a doubtful one; it applies only to cases where the owner has parted with the property by sale or otherwise, and whether it should or should not be extended to cases where he has received payment in due course, and before any title accrued to the assignee is a matter of policy for the Legislature, with which we have nothing to do.

An amendment was made last session, but it does not carry the matter any further so far as this point is concerned, but the language still confines the right of the assignee to recover where there has been a sale or disposal. I think, therefore, that it should be left for the Legislature to say whether the dealing with moneys received in the ordinary course by the transferee was *casus omissus*, or whether reasons existed in their opinion for excepting such receipts from the ordinary rule.

I had written thus far when I was furnished with a copy of the judgment of the Supreme Court in *Clarkson* v. *McMaster*, 25 S. C. R. 96. Mr. Justice Gwynne does not go the length of the Chief Justice, and it is stated that the other Judges concurred, but whether with the Chief Justice or Mr. Justice Gwynne, or in the result generally, does not appear.

I am compelled, therefore, to reconsider the question of whether the transfer in this case was void or voidable, which I have treated above as being too well established to need discussion.

I am not clear whether the Chief Justice means any-

thing further than that it did not require a judgment before a transaction can be avoided; that the transaction was void as against any creditor whenever that creditor elected to avoid it, but the language of the Chief Justice goes further, whatever he may have intended, and declares that the transaction impeached is not voidable but void.

Judgment.

BURTON, J.A.

This is not a matter of opinion, in which I need not say that I should not care to set up my opinion against that of the learned Chief Justice, but the matter is so clearly settled by authority, that I think there must be some mistake in the copy of the judgment. The point was settled many years ago by the House of Lords, and has been uniformly acted upon ever since.

The principle of the distinction appears to me to be very clear, and it is this: Whenever a transaction is declared to be void as against a class of persons such as creditors, or others, it is of necessity voidable only, because it may be that those persons for whose sole benefit the enactment was made may never choose to avail themselves of it, and it would be most unreasonable, therefore, that a creditor who had obtained a security impeachable only by those persons should be deprived of it unless they elected to avoid it.

On the other hand where a security is declared to be void not as against any particular class of persons, but generally, or as it is sometimes expressed, "absolutely void to all intents and purposes," the other construction prevails.

Such, for instance, as one of the Bills of Sale Acts in England, which declared that if the instrument should not be registered within a certain time it should be null and void, not against creditors only, but absolutely.

That is wholesome legislation passed for the purpose of compelling registration and imposing the penalty of forfeiture for noncompliance, and I should hail with pleasure a similar enactment in this country. I have searched for and have been unable to find any case in which, where an instrument has been declared to be void against a particu-

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lar class of persons, it has ever been held to be void except at the election of those persons, and the learned Chief Justice has cited no authority, although he refers to a decision of the Chancellor as containing a true exposition of the law, viz., *Barker* v. *Leeson*, 1 O. R. 114. That case, I think, stands alone, and does not appear to be consistent with two subsequent decisions of the same learned Judge, *Davis* v. *Wickson*, 1 O. R. 369, and *Stuart* v. *Tremain*, 3 O. R. 190.

I was a party to the decision that a subsequent taking possession by a mortgagee could cure a defect in the mortgage, but I subsequently felt grave doubts as to the correctness of the decision, and was pleased that the Legislature interfered.

In conclusion I would say that the language ought to be very clear in a case like the present before the word "void" should be construed as absolutely null.

Take the case of a chattel mortgage given to secure a just and meritorious debt, but open to some objection, *e.g.*, the use of the word "creditor" instead of "creditors" in the affidavit of *bona fides:* such a mortgage, according to the decisions, is void against creditors or an assignee for creditors, but if those creditors for some good reason decide not to avoid it, why should the secured creditor, notwithstanding, be deprived of his security?

The question raised in this case as to the construction and effect of section 8 was not before the Court in *Clarkson* v. *McMaster*, 25 S. C. R. 96, and I think if that section were not in force it may well be that under the general power under section 7 the assignee might avoid the transaction, and that being avoided, it would be void *ab initio*. How far that power is qualified by section 8 is a nice question. Whilst I feel clear that if that section is to be invoked for the purpose of enabling the plaintiff to recover the language is insuffi-cient, it may be that it does not restrict the general power of the assignee. Whilst strongly inclined to the view that it must be considered as restricting his powers in a case

like the present, I feel that as it is a doubtful point I ought not to interfere with the judgment which the plaintiff has obtained, especially as some of the members of the Court have placed a different construction upon section 8.

Judgment.

BURTON, J.A.

OSLER, J. A. :—

I see no good reason to dissent from the finding of the Judge at the trial, affirmed by the Divisional Court, that the transfer to the defendant was made with intent to give an unjust preference within the meaning of the Act; at all events I cannot say that the finding on the evidence is certainly wrong. The transfer was therefore in the language of section 2, sub-sec. 1, of the Act, 54 Vict. ch. 20 (O.); R. S. O. ch. 124, sec. 2, "utterly void."

I cannot see why the law as laid down in *Marks* v. *Feldman*, L. R. 5 Q. B. 275, does not govern this case, and shew that the assignee is entitled to recover the proceeds of the property assigned, or the money received by the defendant in payment of the debts so assigned to him, which is only another way of expressing the same thing.

It is said by Kelly, C. B. (at p. 281): "A transaction voidable by the assignees does not cease to be voidable by the act of the party who has been privy to the unlawful act, and because he has changed the nature of the property, and so has changed the nature of the remedy to which the assignees may be entitled. * * It is a fallacy to say that the defendant received these goods, or afterwards received the money, the proceeds of the goods, under an absolute good title. It was a good title, no doubt, as between him and the bankrupt, but it was a title defeasible in the event of a subsequent bankruptcy and an avoidance of the transaction by the assignee, an avoidance which could be carried out by the assignee demanding the goods if they were still in the hands of the defendant, or by a demand of the money when he had converted the goods into money."

Book debts being a species of property within the meaning of the Act, which, as choses in action, pass to the

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OSLER, J.A.

assignee for creditors just as do ordinary chattels, the principles laid down in the judgment from which I have quoted the above passages apply to them just as much as to property of another description, and to moneys the proceeds of such property, and therefore when converted into money by receipt of payment thereof by the transferee, there can be no reason why the amount so received should not be recovered by the creditors' assignee for the benefit of the estate under the 6th section of the Act.

I refer also to the language of Patterson, J. A., in *Edgar* v. *Central Bank*, 15 A. R. at pp. 212, 214.

It is unnecessary to say anything as to the effect of the 8th section of the Act.

I think that the judgment should be affirmed.

MACLENNAN, J. A. :—

I agree that the appellant's security cannot be upheld, and was rightly set aside.

It was, however, contended that the plaintiff ought not to be allowed to recover the debts collected by the defendant, by virtue of the assignment to him, before judgment declaring it void and setting it aside.

No doubt the assignment was valid as between the debtor and the defendant, and unless and until attacked the defendant's title was perfectly good. The assignment was not void, but only voidable at the option and instance of the assignee.

But for section 8 of the Act respecting Assignments and Preferences, there would be a good deal of difficulty in holding that money collected before the assignee had elected to avoid the assignment, in this instance the commencement of the action, could be recovered back. But, I think, upon the whole, after some hesitation, that the language of section 8 is comprehensive enough to include this case.

The section declares that if the person to whom any gift, conveyance, assignment, etc., as in section 2 of this

Act (now sub-sec. 2 of sec. 1 of 54 Vict. ch. 20), has been made, shall have sold or disposed of the property which was the subject of such gift, conveyance, etc., the moneys or other proceeds realized therefor may be * * recovered in any action * * as effectually as the property if still remaining in the possession or control of such person could have been recovered.

Judgment.

MACLENNAN, J.A.

The question is whether the words "dispose of" are sufficient to describe the collection of the book debts assigned in the present case, and I think they are. I think if the defendant were asked how he had disposed of the debts in question, it would be a correct answer to say he had collected them. I think that if by any fair and reasonable interpretation of the words used they will include the present case, we ought so to interpret them, for it is evident that by so doing we best carry out the general purpose and intent of the Legislature, which is plainly to enable the assignee to recover back the moneys or other proceeds realized from all fraudulent transfers.

I therefore think the plaintiff entitled to recover all the debts collected by the defendant, and that the appeal should be dismissed.

The foregoing was written before the grounds of the recent decision of the Supreme Court of Canada in *Clarkson* v. *McMaster*, 25 S. C. R. 96, had become known. That case seems to shew that the foregoing is the proper conclusion independently of section 8 of the Act.

Appeal dismissed.

The Bridgewater Cheese Factory Company v. Murphy.

Company—Banks—Bills of Exchange and Promissory Notes—Discount by President—Payment to Creditors of Company—Right to Debit Company's Account.

Where the president of an incorporated company made a promissory note in the company's name without authority and discounted it with the company's bankers, the proceeds being credited to the company's account, and paid out by cheques in the company's name to their creditors whose claims should have been paid by him out of moneys which he had previously misappropriated, the bankers, who took in good faith, were held entitled to charge the amount of the note, when it fell due, against the company's account.

Judgment of the Chancery Division, 26 O. R. 327, affirmed, Burton, J. A., dissenting.

Statement. This was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 26 O. R. 327, where and in the judgment of Maclennan, J. A., the facts are stated, and was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ. A, on the 4th of October, 1895.

McCarthy, Q. C., *E. Guss Porter*, and *W. Cross*, for the appellants.

Moss, Q. C., *S. Masson*, and *D. E. K. Stewart*, for the respondents.

January 14th, 1896. Hagarty, C. J. O. :—

I have read the judgment prepared by my brother Maclennan, and fully agree with it. I think he puts the dealing between these parties in the true light, and that the Divisional Court, for the reasons very clearly expressed by my learned brother Meredith, rightly decided against the plaintiffs.

For two or three years the financial dealings of the company seem to have been exclusively conducted by the president, Sexsmith.

He sold the cheese manufactured by his company, receiving the cash therefor, and he paid the patrons (as they are

called) who brought or sold milk and cream to the company by giving cheques on the defendants, who were private bankers.

I think it is clearly shewn that the account kept by the defendants as to all moneys deposited and cheques paid by them, was the account of the moneys credited and debited of the company.

There was no evidence whatever of any dealings between Sexsmith and the defendants, in which, as far as they were concerned, there was any reason to suspect that any private interest of Sexsmith was in any way mixed up with the defendants' account or anything done by them to subserve his interests apart from those of his company; this seems to be conceded.

Sexsmith was in fact applying to his own use moneys received for sales of cheese, which he was not accounting for to the company or depositing to their credit, but all this was unknown to the defendants.

His representation to them was, that money was wanted to meet his cheques for the company, and to meet his request and avoid an overdraft, they agreed to discount a note for $1,600, placing the proceeds to the defendants' credit.

This note was twice renewed, and at last was placed to the plaintiffs' debit.

The full amount of this loan or discount, was chequed out by Sexsmith from time to time to pay debts of the company in their ordinary business.

We have heard argument on the form of this note. It bears the plaintiff company's seal, and so long as it was clearly accepted as an obligation of the plaintiffs, it was, at all events, an advance or discount to them for the express purpose of meeting their cheques on the defendants.

It was to be repaid, and on failure of payment, was charged back.

I cannot think we are driven to hold that, if these plaintiffs, if their account was overdrawn, asked the defendants to

Judgment.

HAGARTY, C.J.O.

place a named sum to the credit of their account for a named period, to be accounted for in the ordinary way of dealing between bankers and their customers, that would be illegal.

I think the plaintiffs put their president in full management of all their ordinary dealings with the defendants' bank, and so long as the latter had no reason whatever to know or suspect that Sexsmith was misusing the company's funds, or arranging this loan or advance for his private purposes or benefit, I think the plaintiffs are bound.

The proceeds of the discount went to pay the plaintiffs' debts, and for other proper purposes.

It seems to me that the fact of Sexsmith being then in arrear to his company, and misapplying their moneys, cannot affect the defendants so long as they were ignorant thereof and acted in good faith. We are not embarrassed by any evidence that the moneys they placed to the plaintiffs' credit, were misapplied or embezzled by Sexsmith.

The moneys being thus properly applied to pay the company's liabilities, I cannot see why they have not the right to charge the note back to the plaintiffs' debit.

Sexsmith wanted the money, not to apply to his own purposes, but because he knew that it was in consequence of his misappropriating the company's money, that there would not be enough in the bank to pay the cheques he would have to give to the patrons. But the bankers knew nothing of this and their money went to pay legitimate debts of the company.

If, instead of crediting the plaintiffs' account with this so-called note, Sexsmith had merely asked them to go on paying the cheques, and they had done so in the ordinary way, I do not see why they could not recover all moneys so paid by them in good faith in satisfying lawful claims on the plaintiffs.

Or, if without any special arrangement, they had gone on paying the cheques drawn on them in the ordinary course, thus in effect allowing the plaintiffs' account to be largely overdrawn, I hardly see why they should not recover.

OSLER, J. A. :— Judgment. OSLER, J.A.

I was at first disposed to think that the evidence compelled the conclusion that the money raised by the discount of the $1,600 note on the 12th of December, 1892, was lent by these defendants to Sexsmith himself, the defaulting president of the plaintiffs, and not to the plaintiffs themselves. If that had been the true state of the case, the defendants would have had no answer to the action, for they would then clearly have had no right to charge back the note in default of payment of the last renewal. But on further consideration I am of opinion that the evidence fairly admits of the opposite inference being drawn, an inference which is more in accordance with the real merits of the case. The plaintiffs are, in my opinion, to be regarded as a trading company: *Albert Cheese Co.* v. *Leeming*, 31 C. P. 272, and as such, had power to make or become parties to a promissory note for the purposes of the company. So far as we know anything of the form in which the note in question was drawn, we should probably be compelled to say that it was not the note of the company, the mere fact of the company's seal being affixed not being sufficient to shew that it was signed on behalf of the company: *Dutton* v. *Marsh*, L. R. 6 Q. B. 361. Nevertheless it was put forward as the note of the company, and the defendants discounted it for them, believing it to be their obligation, placing the proceeds to the credit of the company's bank account. The form which the transaction took, was simply a credit entry of so much as representing these proceeds in the account, against which cheques were afterwards drawn. The money thus lent, was lent to the company and not to Sexsmith; and there is no evidence that the defendants had notice or knowledge of Sexsmith's fraud, or that the money was not being borrowed for the lawful purposes of the company. Default having been made in payment of the note, the defendants charged it to the plaintiffs' account as they would have had an undoubted right to do, had it been the note of the company.

Judgment.

OSLER, J. A.

But the plaintiffs now repudiate it, denying that it is their note, or if it is, that the president had any authority to negotiate it. If they take that position, then as the credit was only given to them on the faith and by means of the note they never were entitled to it. They cannot retain the benefit and reject the liability or disaffirm and at the same time affirm the transaction. Whether, therefore, the credit is struck out of their account or left there, and the amount of the loan charged up against them in it, makes in the result no difference. If they got the defendants money they must return it. If they deny their liability upon the security upon which they invited the defendants to lend it, I think they cannot insist upon being credited with it in their bank account. I, therefore, agree that the appeal should be dismissed.

MACLENNAN, J. A.:—

I am clearly of opinion that this appeal should be dismissed.

I agree generally with the reasons very clearly and forcibly expressed by Mr. Justice Meredith in his judgment.

The principles on which the case should be decided are, to my mind, well established, and there is no substantial dispute about the facts. The plaintiffs are a cheese company, incorporated under the Act 51 Vict. ch. 24 (O.); and the defendants are a private banking partnership. In November or December, 1891, Sexsmith, who was president of the Cheese Company, came to the defendants and opened a banking account with them and made a considerable deposit. The account was on behalf of the Cheese Company, and it was opened on the defendants' books in the name, W. Sexsmith, President Troy Cheese Company, Bridgewater.

Nothing turns on this form of the title of the account because it was understood and intended to be the company's account, and that fact is not disputed. From that

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time until September 18th, 1893, the account continued, deposits being made by Sexsmith, and cheques being drawn by him, and honoured by the defendants. On the 12th of December, 1892, the account was overdrawn to the amount of $57.82, and on that day Sexsmith asked the defendants to discount a note for $1,600. The note is not produced, probably because it is in the possession of Sexsmith, who absconded some time in the fall of 1893, after receiving from the defendants all cheques and other vouchers which were in their possession, including the note in question and two renewals thereof. The note, however, was sealed with the company's seal, signed by Sexsmith as president, payable to his order and endorsed by him, and it was a two months' note. The discount was asked for and on behalf of, and granted to and for, the company, and the proceeds were placed to the company's credit. The note was renewed twice; the last time on the 16th of May, 1893, for one month, falling due on the 19th of June. The renewals were in the same form as the original note, but no entry was made in the account on the occasion of the renewals. When the last renewal fell due, it was charged to the account; the effect being that the account was then overdrawn to the amount of $1,200.99. After that, in July, August and September, deposits were made which balanced the account.

The plaintiffs now sue to recover so much of these last deposits as amount to the renewal note so charged up, namely, $1,611. They say that they had no power to borrow money or to make notes; that the notes and renewals were unauthorized by the board, and *ultra vires* the company, and that for that reason the defendants had no right to charge the note back to their account; and that such charge should be struck out. My learned brother Street gave effect to that contention, but was reversed by the Divisional Court, and, as I think, rightly.

The first observation that I make is, that I see no reason why this company should not have a banking account. The number and magnitude of their transactions shew

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that such an account must be a great convenience, and one cannot suppose that the account with the defendants was without the knowledge or sanction of the directors. The account between January 31st, and November 15th, 1893, shews a large number of payments by cheque, many of them for small sums; and my learned brother Street found as a fact that the cheques were solely in payment of claims against the company. The next observation is that, as also found by my learned brother Street, the defendants discounted the note in good faith, believing it was for the company's purposes, and authorized by the company, and they remained under this belief until long after they had charged it to the company's account.

Now all this being so, I am wholly unable to see what possible claim the plaintiffs can have. I do not see how the fact that Sexsmith had, before he got the note discounted, applied to his own use money of the plaintiffs to an equivalent or greater amount, can possibly affect the defendants. They knew nothing of all that. The fact was that money was due from the company to the patrons. The defendants at the request of the president and treasurer of the company, placed $1,600 to their credit, which enabled them to pay the money so owing, and it was paid out on the cheques of the company in the ordinary way. The Master finds that $1,343 of that money went to the company's patrons, and the learned Judge finds that the remainder also went for the company's legitimate purposes. I do not think, therefore, it makes any difference whether the company had power to make promissory notes or not, or to borrow money or not, for every dollar of the defendants' money which was put to the company's credit, went to pay liabilities of the company, and became recoverable by the defendants. Whether the note was valid or not, the defendants paid with its proceeds actual debts of the company, and became entitled to charge their account with the aggregate of the sums so paid. The effect of that upon the account is the same as if no entry had been made at all in respect of the note, either of the pro-

ceeds or of the dishonoured renewal. I am not satisfied that this company had not power to make a note or to borrow money for their business. When this note was discounted, the president had made away with their money, and left them with large debts unpaid. I am not satisfied that this company could not borrow money to pay those debts, instead of allowing themselves to be sued by their numerous patrons, and their plant and machinery to be seized and sold under execution.

I think, however, that it is unnecessary to decide that point, for whether they could make notes or borrow money or not, they got the benefit of the defendants' money to that amount, by its application directly to the discharge of an equivalent sum of actual liabilities; and upon the authority of *Brooks* v. *Blackburn Benefit Building Society*, 9 App. Cas. 857, they became liable to pay it back. If that is so, it was lawful and proper for the defendants to charge the money so lent and advanced by them back to the company's account in some form or other, whether by charging back the renewal note at maturity or otherwise, and to apply the subsequent deposits to its payment. That is what they did, and the account was thereby balanced, and left nothing due to the plaintiffs.

I have treated the account and notes as the company's account and notes; and I think such is the effect of the evidence. Whether the making of notes was or was not *ultra vires* the company, they were intended and supposed to be the notes of the company, and not the personal notes of Sexsmith. But if the account and notes are to be regarded as Sexsmith's as trustee or treasurer or agent for the company, the case is *a fortiori* in favour of the defendants, in the absence of notice of any fraud or breach of trust on the part of Sexsmith. As to which, see *Ex parte Kingston*, L. R. 6 Ch. at p. 639; *Bodenham* v. *Hoskyns*, 2 D. M. & G. 903; *Gray* v. *Johnston*, L. R. 3 H. L. 1, *per* Lord Cairns and Lord Westbury, and *Brooks* v. *Blackburn Benefit Building Society*, 9 App. Cas. 857, at p. 864.

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BURTON, J.A.

BURTON, J. A. :—

The judgment of the trial Judge has been reversed by the Divisional Court, but, with great respect, I think the learned Judge was correct, and that his judgment should be restored.

It is not disputed that certain deposits were made with the defendants, and there the plaintiffs might have rested their case. The onus was upon the defendants to shew that the debt thus created had been properly discharged.

This they attempt to do by shewing that an instrument signed by one Sexsmith, with the addition of the word "president," and claimed by the defendants to be the note of the company was charged up against the company.

This purported to be the renewal of a note for $1,600, differing only from the note in question by having attached to it the company's seal.

The evidence falls far short of shewing that the instruments relied on were in any sense the company's notes, even if they had power to make notes, which is, I think, very questionable. It is not shewn what the body of the note contained, or who, if any one, were or was described as promissors or promissor, and they are signed as I have described, the last one not even having the seal attached.

The president had no authority to borrow unless specially authorized by the board of directors, and this any person dealing with the company, must, as a matter of law, be supposed to have known, and they cannot, therefore, complain if his act is repudiated; so that even if it were established that the company had benefited by the contract, that would not amount to a ratification, nor could the company be held to have incurred an obligation *quasi ex contractu*.

Here, in addition, it is proved that the board of directors never authorized the affixing of the seal; they had no occasion to borrow; nor had they any knowledge of the existence of the note; nor is it shewn that it was made payable at the office of the bankers, which would

alone authorize them to charge it to the plaintiffs' account in the absence of express instructions. Judgment. BURTON, J.A.

The case cannot, on this branch of it, stand any higher than if an action had been brought upon the note; and I agree with the learned trial Judge that in any such action the bankers must have failed.

But then it is said that even if the note did not constitute a valid debt, the defendants were entitled to stand in the place of those whose claims against the company had been satisfied out of the money borrowed. The learned Chief Justice has proceeded in his judgment upon this ground, and I should not feel disposed to differ from him if I agreed with him as to the facts.

I do not for a moment contend that this rule does not extend to money borrowed *bonâ fide* and so applied; and the doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors whose claims have been paid off by his money, and partly on the ground of the right of the borrowing partner or director to be indemnified against liabilities *bonâ fide* incurred by him for the legitimate purpose of relieving the company from its debts.

The evidence here establishes that the president had, or should have had, in his hands at the time he discounted the note, sufficient to discharge their debts, and if he had not deposited funds with the bankers to the credit of the company to meet them his default would have been at once discovered.

Lord Justice Giffard, in *In re National Permanent Benefit Building Society*, L. R. 5 Ch. 309, at p. 313, in commenting upon such cases as *In re German Mining Co.*, 4 D. M. & G. 19, whilst recognizing the principle governing those decisions, adds: "I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them." Here it is invoked in favour of a man who had received funds of the company which should have been applied to the payment of their

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debts, and which he had no means of paying except by committing this fraud, for fraud it was.

As the learned trial Judge says: "The plaintiffs sue for the balance which would appear at their credit, had this note not been charged; the defendants answer that they have accounted for and paid over that balance."

I agree also with the concluding remarks in his judgment:

"Upon the facts and pleadings, I am of the opinion that the defendants have shewn no right to charge the plaintiffs with the amount of this note. As a matter of law, the note was not the note of the plaintiffs, but was the individual note of Sexsmith; as a matter of fact the account to which the note was charged, was a trust account, the moneys at the credit of which belonged to the plaintiffs, and not to Sexsmith, and the defendants knew this."

I do not for a moment question the law that to hold a banker justified in refusing to honour a cheque of his customer, being a trustee, there must in the first place be some misapplication, some breach of trust intended, and proof that the bankers were privy to the intent to make this misapplication. I could not do so even if I doubted, for it has been so held by the very highest authority; but apart from authority the conclusion seems irresistible, but those decisions have no application to the case we are considering. I have already conceded that if Sexsmith, acting on behalf of the company, though without authority, borrowed this money, and the company received the proceeds, they could not repudiate the transaction whilst receiving the benefit. Why it was thought necessary to enquire about the cheques subsequently given by which that money was withdrawn for purposes of the company, I am at a loss to understand. The money was undoubtedly paid in to the credit of the company, and that was quite sufficient to establish that they got the benefit of it; but their liability even then depended on whether the money was borrowed for them, or whether it was borrowed by Sex-

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smith on the security of what purported to be their note payable to him individually and discounted by him for his own benefit.

The learned Judge at the trial held that the money which Sexsmith borrowed from the defendants "was in reality borrowed by him to make good his defalcations;" and there is to my mind a great deal in the evidence to warrant that inference.

It is not usual for a person negotiating a discount for himself to do so on his own note payable to another person.

In such a case as that before us, if the transaction was such as is now contended for, and the company were the parties to obtain the discount, we should expect to find the note made by Sexsmith as promissor, payable to them, and to find them or their presumably authorized agent offering the note for discount, and receiving the proceeds. I admit that it is not conclusive; but it is a piece of evidence, taken in connection with other facts in the case, tending to shew that the discount was made by Sexsmith.

Then it is said in the evidence, that this book (referring to the discount ledger), shews the first series of notes to have been discounted for E. Sexsmith, and a little further down, it is shewn that it did not shew for whom the third renewal was discounted; but that is immaterial, if the first of the series was discounted by Sexsmith, the payee and the indorser, and not by him as president and on behalf of the company.

And again, when asked how they came to charge the note to the company, the answer is, not because they got the discount, but "because it was the company's note."

Taking this in connection with the fact that the company had no occasion to borrow; that they never had borrowed; that the money was required by Sexsmith to cover his own defalcations to the company, I think it was not an unnatural inference for the learned Judge to draw that in point of fact the discount was made by the person who was apparently the holder of the note, and who would

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be the person to negotiate it in the usual course of business. If that conclusion be the correct one, the claim of the defendants to charge the plaintiffs falls to the ground; the money went to discharge *pro tanto* the debt of Sexsmith, and in that way, and that only, did the plaintiffs get the benefit of the money. I think there was evidence to warrant the learned Judge in coming to the conclusion that the note was discounted by Sexsmith individually; that he placed or directed the money to be placed to the credit of the company in order to discharge his own debt, and under such circumstances there could be no pretence for holding the company responsible.

There is evidence which, if believed, would warrant the conclusion that the discount was made on behalf of the company, but there is evidence the other way, which supports the view that the note was discounted by the payee Sexsmith, the apparent holder, which would be the usual course of business in such cases.

The learned Chief Justice says the finding is against that contention, but I do not so read it; on the contrary, as I read it, and as I think the evidence warrants, the finding is that the note was discounted by himself to enable him to discharge his liabilities and conceal his defalcations.

The fact that he gave cheques as he did, does not warrant in any way his binding the company by notes. The bank account was earmarked, as it were, by being kept in his name as president; and the only way in which cheques could properly be drawn on such an account was as they were, drawn in his name, with the addition of the word, "president." If he had abused this position, and had fraudulently drawn cheques for his own purposes, I do not for a moment doubt that the plaintiffs would have had to bear the loss; but this is an entirely different case; the plaintiffs never authorized him to sign bills or notes on their behalf; on the contrary, the directors appear to have been very particular, even in matters of very trifling moment, to pass resolutions to authorize them.

Here one of two innocent parties is to suffer. I do not

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see that the plaintiffs have done or omitted to do anything which placed it in the power of Sexsmith to commit the fraud, which he did commit by making a note of the company in his own favour; but the defendants ought to have known, and must be presumed to have known, that Sexsmith had no authority to issue a note on their behalf; and concurring as I do with the learned Judge, that he negotiated that note for his individual benefit, I am of opinion that the equitable doctrine to which I have alluded, cannot be invoked in his favour.

The appeal should, in my opinion, be allowed.

Appeal dismissed, BURTON, J. A., *dissenting.*

In re Hodgins and the City of Toronto.

Municipal Corporations—Local Improvements—Sidewalks—55 Vict. ch. 42, sec. 623b (O.).

Publication of an advertisement in a newspaper having a large circulation in the municipality stating that the corporation intend to construct sidewalks in certain named districts is not sufficient notice to a property owner affected by the proposed work.

The procedure to be observed in passing by-laws for the construction of sidewalks considered.

Judgment of STREET, J., 26 O. R. 480, affirmed.

Statement. THIS was an appeal by the city of Toronto from the judgment of STREET, J., reported 26 O. R. 480, quashing a local improvement by-law.

The by-law in question provided for the construction of certain sidewalks, and the applicant moved to quash it, so far as it affected his property, on the ground that no notice had been given to him of the intention of the council to pass it. Notice had been given by advertisements published in daily newspapers having a large circulation in the city of Toronto, but the advertisements dealt with sidewalks in many localities, and the applicant swore that he knew nothing about the proposed work.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd of November, 1895.

Fullerton, Q. C., and *T. Caswell*, for the appellants. Prior to the 7th of April, 1890, plank sidewalks could only be put down in a municipality as local improvements. The result was that a municipal corporation could not compel a sidewalk to be laid upon a street, and yet was responsible for want of repair. For this reason the city applied to the Legislature in 1890 for power to lay down plank sidewalks, whether the owners of the adjoining property approved or disapproved, without incurring the expense of taking proceedings under the ordinary local improvement clauses of the Municipal Act. The Legisla-

ture, by the Act, 53 Vict. ch. 50, sec. 42, determined that "notwithstanding anything contained in section 612 of the Municipal Act, or in any by-law of the municipality, the corporation of any city may construct and lay down a plank sidewalk upon and along any street, lane, alley, or other thoroughfare or park in the said city as a local improvement, and the cost thereof may be assessed against the properties fronting or abutting thereon, if such sidewalk is, in the opinion of two-thirds of the members present at any regular meeting of the city council, desirable in the public interest." In the next session, by the Act, 54 Vict. ch. 42, secs. 33, 34, the section was extended so as to make it apply to a town as well as a city, and by changing the words, "section 612," to the words, "sections 612 to 623 inclusive." Under this section plank sidewalks have been put down in cities and towns all over the Province, without any notice to the owners of property fronting or abutting upon the streets, and the intention that no notice should be given is apparent from the wording of the statute. Sections 612 to 623 of the Municipal Act provide for all classes of works upon streets being done at the expense of the property abutting upon such streets, and provide also for notices being given to such owners, and power is given to them to petition for or against the work. When the Legislature enacted section 42 above referred to (now section 623*b* of the Consolidated Municipal Act, 55 Vict. ch. 42), it intended that none of the provisions in sections 612 to 623 should be obligatory upon the municipality in proceedings taken in connection with putting down a plank sidewalk. If a notice of the intention of the council to put down a plank sidewalk is required to be given to each of the parties interested, the expense would in many cases almost equal, if not exceed, the cost of the sidewalk itself. *Bain* v. *City of Montreal*, 8 S. C. R. 252, points out the distinction as to notice under an Act of this kind. If nothing is said about notice it is implied to be necessary, but in an Act like this, where notice is provided for in so many cases, the infer-

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ence is that it is not necessary when not specifically required. For this reason the cases cited below do not apply. Notice was given in this matter by advertisement as an act of grace to enable the parties to ask for a better sidewalk if that was desired.

F. E. Hodgins, for the respondent. The policy of the law respecting municipal assessments for sidewalks is, that notice should be given to the ratepayers intended to be made liable for the proposed local improvement rates, so that they may be enabled to shew that in the interest of the locality the proposed sidewalk should not be constructed of plank, but of some other and more durable material, or that they desire to construct the sidewalk under section 623 of the Act, or that the proposed improvement would come within the expression, "the work of ordinary repair or maintenance," referred to in section 614 of the Act. The process of assessment is in the nature of a judicial proceeding, and the rule applies that no man shall be condemned unheard. So far indeed has this doctrine been extended, that in cases where a statute has been entirely silent on the subject of notice, the Courts have felt justified in implying it as a condition precedent: *Nicholls* v. *Cumming*, 1 S. C. R. 395, at p. 427; *Timmerman* v. *City of St. John*, 21 S. C. R. 691, at p. 709; *Clement* v. *Wentworth*, 22 C. P. 300; *Winter* v. *Keown*, 22 U. C. R. 341; *Re Ingersoll, Gray* v. *Ingersoll*, 16 O. R. 194; *Metcalfe* v. *Cox*, [1895] A. C. 328.

Fullerton, Q. C., in reply.

January 14th, 1896. HAGARTY, C. J. O.:—

It is conceded that this case depends on section 623*b*. The corporation have the absolute power by a two-thirds vote at a regular meeting, to lay down a sidewalk and to assess the cost on the properties abutting thereon; and this, "notwithstanding anything contained in the preceding fourteen sections of this Act."

This clause enables the two-thirds of the council at

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once to decide that the work shall be executed, and the cost assessed; no petition for or against is required.

But it seems impossible, on the language used, that the Legislature could have intended to go further than the decision to do the work and make an assessment; and in effect to prevent the abutting owner to object to the amount assessed, or the extent of his frontage, or to avail himself of the necessary safeguards provided for his protection against error intentional or innocent.

An assessment charging lands has always been considered a judicial act, of which the party affected must have notice and be allowed to be heard. On this, I may refer to my brother Street's judgment and the authorities there cited.

If the Legislature choose to take away this important protection, it can be done by apt and intelligible words.

As the law now stands, I think the judgment below was right, and the appeal should be dismissed.

BURTON, J. A.:—

This was a motion to quash a by-law of the city of Toronto, so far as it affected the property of the plaintiff.

The question turns upon the construction to be placed upon section 42 of 53 Vict. ch. 50, as amended and now to be found as section 623*b* in the Municipal Act of 1892, which enacts that notwithstanding anything contained in sections 612 to 623 inclusive, of the Municipal Act, the corporation may construct and lay down a plank sidewalk, upon and along any street as a local improvement, and the cost thereof may be assessed against the properties fronting or abutting thereon, if such sidewalk is, in the opinion of two-thirds of the members present at any regular meeting of the city council, desirable in the public interest.

This enactment, it is admitted, was passed at the instance of the defendants to enable them without reference to the wishes of the abutting proprietors to lay down plank sidewalks without going to the expense of taking proceedings under the ordinary local improvement clauses.

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BURTON, J.A.

The justice of making the owner of a property abutting on the street pay for a sidewalk, the use of which is enjoyed by the public generally, and which may be of no benefit to him, is not very apparent; but the Act would seem to impose the burden on the owners on each side of the street, and not to confine it to the one side as has been done here.

The contention of the city is, that none of the provisions in the local improvement clauses 612 to 623, were, as regards plank sidewalks, to be obligatory upon the municipality.

Acting upon this view of the law, the city engineer recommended, among a great many other works, the laying down of a sidewalk, not along the whole street, but for a short distance, the greater portion of which was in front of the plaintiff's property.

The fact that such a recommendation had been made was advertised once in each of two city newspapers, intimating that if adopted by the board of works, it would be considered by the city council, not on a particular day, but at any time after the 6th of June next.

It is alleged on the part of the city that it was not obligatory on them so to advertise, but they did so as a matter of grace, and that no person could be heard against the action of the council, but that it was done to enable the ratepayers affected, if they desired it, to suggest a better or different class of sidewalk.

The council, on its coming before them, by an unanimous vote declared it desirable in the public interest that the work should be proceeded with.

The applicant deposes that he had no notice or knowledge of these proceedings, and that the first and only intimation he ever received was in his tax bill, in which he was charged with his proportion of the assessment.

If, as the appellants urge, the Legislature has expressed its will that in cases coming within section 623*b*, the ordinary rule of giving notice to a ratepayer that he is

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BURTON, J.A.

assessed in order that he may be heard against it, is abrogated, there is nothing more to be said, however contrary to natural justice the proceedings adopted in this case by the council may seem, but before we could place such a construction upon this section, the language must be so clear and unequivocal as to leave us no option. The imposing a tax upon the property of another is a quasi-judicial proceeding, and the words of a statute must be so free from doubt as to place it beyond all question that so equitable and fundamental a principle was intended to be departed from, but whatever may have been the intention of the promoters, and whatever may be the proper interpretation of section 623*b*, it cannot, I think, be read as meaning that none of the provisions of the fourteen preceding sections are to apply to works authorized under it, but that if the construction or laying down of a sidewalk upon any street, is, in the opinion of two-thirds of the members of the council, desirable in the public interest, the work may be proceeded with, notwithstanding that it is not petitioned for, and that in such a case a petition against it would be of no avail. But I do not understand that none of the powers or restrictions contained in those clauses, are to be applicable to such a work. If the contention of the city be well founded, what authority had they to raise the money before the completion of the work, the only authority for which is to be found in section 619 ?

But I repeat that, whatever may be the proper interpretation of this not over-clear enactment, there is nothing in it to over-ride the general rule that when a person's property is to be affected by anything analogous to a judicial proceeding, he is entitled to be heard. No opportunity was afforded to the applicant in this case to be so heard, and the by-law, which makes no provision for his being so heard, is defective, and was properly quashed.

The appeal should, therefore, be dismissed with costs.

Judgment.

OSLER, J.A.

OSLER, J. A. :—

The council appear to me to have acted under a complete misconception of the powers conferred upon them by 53 Vict. ch. 50, section 42 (O.), now section 623*b*, of the Consolidated Municipal Act, 1892. They seem to have supposed that it gave them the right, if in the opinion of two-thirds of the members of the council present at any regular meeting it was desirable in the public interest to do so, to construct a plank sidewalk on any street, and to assess the cost against the properties fronting or abutting thereon ; and this, without having the assessment confirmed by the Court of Revision and without giving the property owners any notice of the assessment other than the demand for its payment in their tax bills. No doubt the Legislature might, if they thought fit, confer an arbitrary power upon the council to tax private property for a work executed for the public benefit, and to enforce the tax by a summary proceeding without notice to the property owner. But such legislation would *ex facie* be so contrary to natural justice, and to well settled legal principles that it would require very strong and clear language to warrant any Court in holding that the power was conferred.

I refer to the language of Strong, J., in *Nicholls* v. *Cumming*, 1 S. C. R. 395, 427, and in *Bain* v. *City of Montreal*, 8 S. C. R. 251, at p. 267, and to *In re Hammersmith Rent-Charge*, 4 Exch. 87, and *Capel* v. *Child*, 2 Cr. & Jer. 558, at p. 577.

The above cases shew that the imposition of a tax of this kind is in the nature of a judicial proceeding.

Finding nothing in the language of section 623*b*, which points to the right to exercise without notice the arbitrary powers which the appellants conceive it confers upon them, it would follow that their proceedings having been taken without any notice to the respondent, are illegal and that the by-law and assessment should be quashed on that ground alone. So far, however, from its having been the

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OSLER, J.A.

intention of the Legislature to confer upon the council the new and extraordinary power they contend for, it is manifest that the object of the section was merely to enable them to construct a plank sidewalk as a local improvement without being liable to have the work, when initiated by them, frustrated by the opposition of the property owners under section 617.

The work is still to be done as a local improvement. It may, if the council see fit, be undertaken on the petition of the property owners under section 616, or it may be undertaken by them on the initiative under section 617. If so undertaken it may be carried out on that plan if not petitioned against by the requisite number of property owners, or if so petitioned against, then if the council under section 623*b*, decide notwithstanding by the requisite majority that the work is one desirable in the public interest. This construction harmonizes section 623*b* with the proviso of sub-section 3 of section 619, which enacts that no assessment shall be made, or work or improvement undertaken, except it be initiated in some one of the three methods by law provided: (*a*) report of engineer, etc., recommending it for sanitary or drainage purposes; (*b*) on a petition of the owners of the real property affected, sufficiently signed; or (*c*) after due notice as provided in section 618 of the proposed assessment, and no sufficiently signed counter-petition being presented within the time limited.

Section 623*b* enables the council upon certain conditions to get over the last restriction, but in the absence of language expressly or by necessary implication authorizing them to impose the assessment for the work without notice, we cannot for a moment allow that they are warranted in dispensing with the requirements of section 618 as to publication of notice of the assessment and with the action of the Court of Revision, because that is all consistent with the exercise of their power under section 623*b*.

I have not failed to notice the amendment which was made by 54 Vict. ch. 42, sec. 34 (O.) in sec. 623*b*, salving, as

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it were, anything contained in the preceding fourteen sections of the Act, instead of as formerly in section 612 only. The reason of that amendment seems very plain, viz., that the first Act practically did not enlarge the powers of the council at all as it merely relieved them from the necessity of passing a by-law for providing the means of ascertaining and determining what real property would be benefited, etc., perhaps a needless formality in the case of a local improvement like a plank sidewalk.

It may be observed that under the Act as it now stands, where the council intend to proceed under 623*b*, the cost of the sidewalk is to be assessed only against the properties fronting or abutting thereon, *i.e.*, on the sidewalk, as I should read the section, whereas under section 613 (1), as it appears amended in the Act of 1892, the special rate for a local improvement is assessable where section 623*b* is not acted on, not merely on real property fronting or abutting upon, but also on such property extending to within six feet of the street or place whereon or wherein the work or improvement is proposed to be done. Whether they may include property on both sides of the street, though the sidewalk is on one side only, may be questionable.

A further objection to this by-law is, that in passing it the council appear to have acted under a general by-law passed under sections 615 and 625, the former of which enables them to pass by-laws for determining what real property will be benefited by the proposed work, etc. (see sections 7 and 26 of general by-law), and the latter for declaring what classes of improvements or service shall be the subject of local assessment (section 26 of by-law as to plank sidewalks), whereas the evident intention of section 623*b* is that as to a work of that description where carried out under that section the discretion of the council shall be exercised in the prescribed manner in each particular case. They are not authorized to pass once for all a by-law that all plank sidewalk improvements shall be constructed under the section.

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I will only add that if, as the appellants contend, section 623*b* is their sole and sufficient authority for constructing the work and levying assessments, the previous fourteen sections not being applicable, the by-law shews they have not acted on that view. They have on the contrary taken advantage of section 619 to borrow money as a temporary loan for the purpose of paying the cost of the work before its completion. This they certainly could not have done had section 623*b* been their charter. If it stands by itself they could only do the work first, and then make an assessment for its cost.

I cannot say that I feel any doubt as to the invalidity of the by-law, and I therefore agree in affirming the judgment.

MACLENNAN, J. A.:—

I think this appeal should be dismissed, both for the reasons and on the grounds stated by my brother Street, and for other reasons. I do not think section 623*b* ought to be so construed as to dispense with the notices and other proceedings provided in the preceding fourteen sections. Section 617 enables the owners of property to be affected to oppose, and, if a certain number of them join in doing so, to prevent proposed improvements from being proceeded with. The section in question, I think, was intended merely to enable the council to do the work, notwithstanding such opposition, provided two-thirds of the council thought it desirable in the public interest. The point was not taken, I think, on the argument, but it appears to me that upon a proper construction of both sections 613 and 623*b*, the assessment for the construction of sidewalks must be on the frontages on both sides of the street; and this also seems to be a fatal objection to the by-law.

Appeal dismissed.

HANES v. BURNHAM.

Defamation—Slander—Privilege—Malice—Post-Office Inspector—Notice of Action.

A statement by a post-office inspector when investigating complaints as to lost letters, to the sureties of the post-master, that the post-master's wife has stolen the letters in question and has given him a written confession of her guilt, is *primâ facie* privileged, because of the financial interest of the sureties in the investigation.

Semble: Such a statement to a partner of one of the sureties is not protected.

The facts that the plaintiff at the trial denies having stolen the letters and having made any confession, and that the inspector does not produce the alleged confession or in any way account for it, is some evidence that he made the accusation knowing it to be untrue, and therefore maliciously, so as to displace the *primâ facie* case of privilege.

A post-office inspector is not entitled to notice of an action to recover damages for defamatory statements made by him.

Judgment of the Common Pleas Division, 26 O. R. 528, affirmed, OSLER, J.A., dissenting as to three of the statements in question on the ground that the inference of malice was rebutted by the plaintiff's own evidence.

Statement. THIS was an appeal by the defendant from the judgment of the Common Pleas Division, reported 26 O. R. 528, where the facts are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd of October, 1895.

W. Nesbitt, and *F. E. Hodgins*, for the appellant.

G. Lynch-Staunton, and *J. G. Farmer*, for the respondent.

January 14, 1896. BURTON, J. A.:—

This is an action of slander. At the time when the slander was uttered, the defendant was an assistant inspector in the post-office department, and had been concerned in an investigation of some alleged irregularities in the post-office at Lynden, of which the plaintiff's husband was post-master, which resulted in his resignation; and although no imputation rested upon him, a good deal of suspicion rested rightly or wrongly on his wife; the defamatory words were spoken of the wife, and as charged were in very strong terms, accompanied by an assertion

that she had signed and given to him a written confession of her guilt. Judgment. BURTON, J.A.

No doubt the question of whether the occasion is privileged, if the facts are not in dispute, is a question of law only for the judge and not for the jury.

The investigation, as I have said, was over, and had resulted in the resignation of the post-master. During that investigation, or even after it was closed, a communication made *bonâ fide* by the defendant upon the subject matter of the enquiry, in reference to which he had a duty, would have been privileged, provided only that the person to whom the communication was made, had a corresponding interest or duty; but I do not think that a mistake of the defendant in making that communication to a person whom he believes to have an interest, or his belief however honest that he has such interest, or that a duty is imposed upon him to make such a communication, can make any difference in deciding whether the occasion is a privileged one; and I agree with the Divisional Court, that no such interest or duty existed in what took place with Ryan; but even if privileged, that privilege would be lost if the defendant was actuated by malice.

I am very far from saying that the jury should find malice—if the defendant acted from a sense of duty, that may go very far to negative malice in fact; but it must surely be important to the decision of that question, whether the defendant did or did not *bonâ fide* believe that he had been furnished with a confession of the plaintiff's guilt.

I think this question could not be withdrawn from the jury, and that the judgment of the Divisional Court should, therefore, be affirmed.

OSLER, J. A.:—

That the occasions on which the alleged defamatory words were uttered in the presence of the plaintiff's husband, of F. Clement and of Wm. Hanes, were privileged

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occasions, as held by the trial Judge and the Divisional Court, can admit of no reasonable doubt. The defendant was engaged in making enquiries into the alleged misconduct in the management of the post-office. The plaintiff's husband was post-master. She, herself, had been entrusted with the management or partial management of the office, and Clement and Hanes were her husband's sureties. Statements made to such persons in the course of the investigation and directly connected with it, are clearly within the rule that an occasion is privileged when the person who makes the communication has a moral or social duty to make it to the person to whom he does make it, and when the latter has an interest in hearing it. The occasion then being privileged, the burden was on the plaintiff to prove actual malice on the defendant's part; that is to say, that the defendant abused the occasion by not using it fairly, but for some indirect and wrong motive; not for the reason that made the occasion privileged, but for some personal motive of his own—to gratify anger or ill-will; or to bring pressure for example to bear upon the plaintiff to take some course he desired her to take. "One definite and well-known way," said Lord Esher in *Baker* v. *Carrick*, 9 R. 283, "of proving malice is to shew that what has been written or said is untrue, and was known by the writer or speaker to be untrue." So in *Fountain* v. *Boodle*, 3 Q. B. 5, at p. 12, *per* Lord Denman: "Malice may be established by various proofs: one may be that the statement is false to the knowledge of the party making it;" and he says he told the jury in that case, to the effect that if the plaintiff brought any evidence of wilful untruth, some evidence to the contrary might be reasonably expected where the nature of the case allowed it. See also *Clark* v. *Molyneux*, 3 Q. B. D. 237. In a case of this kind, the presumption is in favour of good faith, belief in the truth of the imputed misconduct, and honest motive on the part of the defendant, so that as a general rule proof merely of the falsity of the accusation is not sufficient to shew that it was prompted by a malicious motive. What the plaintiff relies on in

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this case is, that as the defendant, in alleging that he had a written and signed confession of her guilt, drawn up by himself, and signed by her, on the occasion of a previous investigation into the affairs of the same post office, made little more than a year before the words complained of were uttered, was stating something of which he must, if true, have had personal knowledge, the fact that no such confession had ever been made or signed, was some evidence that the defendant could not honestly have believed in the truth of his accusation, or was making it recklessly not caring whether it was true or false, and from some indirect and wrong motive, and not for the reason that made the occasion a privileged one. Had the evidence for the plaintiff stopped at this point, I am disposed to think there would have been some evidence of malice in fact to go to the jury, because proof that a statement of that kind was false in fact, would involve the proposition, *primâ facie* at least, of the knowledge of the truth on the defendant's part. Such evidence if unrepelled by the party affected by it, as *e.g.*, by shewing that there was a confession, or that he had really and honestly been under the impression and belief that there was one, might well be deemed sufficient by the jury to warrant an inference unfavourable to him.

It appears to me, however, that the evidence of the plaintiff and her witnesses furnishes the proof that malice was really absent, notwithstanding the fact that the defendant was speaking of something, that if true, ought, had his recollection been accurate, to have been within his own knowledge; and that from circumstances which occurred when the former investigation took place in March, 1893, the defendant, when the fresh trouble arose in May, 1894, was under the impression, and honestly believed, that he had obtained from the plaintiff a written confession of her misconduct on the former occasion. The plaintiff has failed to prove actual malice, and, therefore, as to the three occasions I have spoken of, I am, with all respect to the Court below, of opinion that the case was properly with-

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drawn from the jury. There was, however, a fourth occasion on which the defendant is said to have made use of similar language to one Ryan; and as to this, I agree with the Court below, that the trial Judge was wrong in withdrawing it from the jury: see *Roberts* v. *Climie*, 46 U. C. R. 264. I cannot see that there was either a moral or social duty cast upon the defendant, under the circumstances, to say anything to Ryan about the plaintiff's alleged misconduct, or that he had a larger interest than any other member of the public in knowing anything about it. The question he put to the defendant, and which the defendant answered at large, called, in my opinion, for no such liberal disclosure on his part. I agree with the judgment below, that this occasion was not privileged for the reason assigned. The statements made were defamatory, and that being so, it was the province of the jury to determine whether, on the whole of the facts, the inference that they were made maliciously, ought, under the circumstances, to be drawn. To this extent the action was properly sent back for a new trial. In other respects the nonsuit should stand and the appeal be allowed.

MACLENNAN, J. A.:—

I am of opinion that this appeal should be dismissed.

I agree with the judgment of the learned Chief Justice of the Common Pleas Division, that all the occasions but that of the conversation with Ryan, were privileged. With regard to the Ryan interview, I think it was not, according to Ryan's evidence, and it was the only evidence of what then took place. The conversation was casual, and without any object or purpose other than mere gossip, not arising from any duty, public or private, moral or social, on the defendant's part, and without any desire, request, or interest, on the part of Ryan, for, or in the matter thus communicated.

I also agree that in respect of the occasions which were privileged, there was evidence of actual malice, which could not be withheld from the jury.

The case of *Stuart* v. *Bell*, [1891] 2 Q. B. 341, referred to by the learned Chief Justice, throws a strong light upon the law of privilege in actions of defamation. Judgment. MACLENNAN, J.A.

I think the judgment appealed from is right, and that there must be a new trial.

HAGARTY, C. J. O. :—

I am of the same opinion.

Appeal dismissed.

SMITH V. THE WALKERVILLE MALLEABLE IRON COMPANY.

Company—Share Certificates—Estoppel—R. S. O. ch. 157, sec. 52.

A company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words, "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment endorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate :—

Held, that the transfer to the plaintiff, in view of the provisions of section 52 of the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, conferred upon him a mere equitable title which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares.

Judgment of MACMAHON, J., reversed, HAGARTY, C. J. O., dissenting.

THIS was an appeal by the defendants from the judgment of MACMAHON, J. Statement.

The plaintiff brought the action to compel the defendants to recognize him as the transferee of twenty-two shares of the capital stock of the defendant company assigned to him by one White, or to pay to him the value thereof as damages.

Statement. The following statement of the facts is taken from the judgment of OSLER, J. A.:

White was, during the period to which the transactions in question relate, the secretary of the company, and on the 4th of January, 1893, he appeared on the company's books to be the holder of 466 shares, for which he held several share certificates for different amounts, and, *inter alia*, certificate number 27 for 20 shares. All the certificates were in the following form: "This is to certify that Henry F. White is entitled to —— shares of $25 each of the capital stock of the Walkerville Malleable Iron Company, Limited. Transferable only on the books of the company in person or by attorney on the surrender of this certificate": under the seal of the company and signed by the secretary and president.

On the back of each share certificate issued by the company is a blank form of transfer of shares, not specified as being the shares mentioned in the certificate, which includes a power of attorney to transfer the shares in the books of the company.

On the 4th of January, 1893, White transferred to C. R. Black 228 shares by entry and acceptance thereof duly made in the company's books, leaving him the owner of 238 shares, for which he procured a single new share certificate number 32. The former certificates which should have been then delivered up and cancelled were 25, 26, 27 and 28. White, however, retained possession of number 27, though he no longer held any shares under it.

On the 14th of January, 1893, he transferred by entry duly made in the company's books 176 shares, viz., 56 to one Walker and 120 to one H. Walker, which left him apparently and actually entitled on the books of the company to 62 shares, for which on the 28th of January, he procured two share certificates, number 46 for 40 shares, and 47 for 22 shares. Certificate number 32 was probably brought in and exchanged for these on the 14th or 28th of January.

On the 16th of February, 1893, White transferred to one Ellis 40 shares by endorsement on certificate number 46

in the following terms: "For value received I hereby sell, assign and transfer to W. H. Ellis 40 shares of the within stock, and do hereby constitute and appoint the said W. H. Ellis my attorney to transfer the same on the books of the company. Witness my hand and seal," etc. Statement.

On the 7th of August, 1893, he transferred to one Letts 2 shares, not by endorsement on any certificate. The entry of this transfer in the company's books was not made until the 26th of December, 1893.

On the 4th of March, 1893, he transferred to one Hunter 20 shares by endorsement on the annulled certificate number 27. The endorsement was in the same form as above except that White thereby purports to appoint himself and not Hunter the attorney to make the transfer on the books of the company. It seems clear, however, that the certificate so endorsed passed into Hunter's possession.

On the 3rd of April, 1893, White transferred to the plaintiff 22 shares by endorsement in the same form upon and by delivery to him of share certificate number 47, the plaintiff being constituted his attorney to make the transfer entry in the company's books.

The result of these transactions was that White had sold 20 shares more than he was entitled to.

On the 22nd of June, 1893, White transferred 20 shares to Hunter in the company's books, presumably those which had been sold to him on the 4th of March, executing the deed of transfer in his own name, but without reference to or the production of certificate number 27. Hunter at the same time signed an acceptance of the transfer, thus apparently completing his title to the 20 shares bought by him, or to 20 shares of the stock which then appeared at White's credit in the stock ledger.

On the 3rd of January, 1894, Ellis's title was completed, the transfer of the 40 shares purchased by him being duly entered in the books and accepted by him, thus covering and transferring all the stock at White's credit.

About February, 1894, the plaintiff applied to have the shares, which had been sold to him with certificate 47,

Statement. transferred into his name in the company's books, but his application was refused on the ground that all the shares owned by White had been already transferred.

In September, 1893, Hunter sold his 20 shares to Walker, the president of the company, at the same time producing and leaving with him certificate 27.

The action was tried at Sandwich, on the 13th of April, 1895, before MacMahon, J., who on the 11th of May, 1895, gave the following judgment in the plaintiff's favour:—

The plaintiff presented the certificate to Mr. E. C. Walker, president of the company, in February, 1894, and asked to have the stock transferred to his name in the books of the company or for a new certificate to be issued to him, which was refused, the reason assigned being that White had already transferred all the stock issued to him, and that the transfers had been made on the books of the company.

E. C. Walker admitted that certificate number 47 had been duly issued by the company bearing the seal of the company attached thereto, and was signed by him as the president, and by White who at the time of its issue was the secretary-treasurer of the company.

What was said by the president, at the time the plaintiff required the transfer, was that to the extent at least of the shares mentioned in the certificate White had caused an over issue of the stock. But he said that had the plaintiff made his request at any time up to June, 1893, the stock would have been transferred to his name.

The 4,000 shares into which the capital stock of the company was by its charter divided, have all been issued, so that the plaintiff cannot now be registered as a shareholder.

Upon the authority of *Shaw* v. *Port Philip, etc., Company*, 13 Q. B. D. 103; *Williams* v. *Colonial Bank*, 38 Ch. D. 388, at p. 400; *Hart* v. *Frontino, etc., Company*, L. R. 5 Exch. 111; *In re Ottos Kopje Diamond Mines*, [1893]

1 Ch. 618; *Morton* v. *Cowan*, 25 O. R. 529; *In re Bahia and San Francisco R. W. Co.*, L. R. 3 Q. B. 584, the plaintiff is entitled to recover the value of the shares, which are worth $25.00 each. Judgment. MacMahon, J.

There will be judgment for the plaintiff for $550.00 with costs of suit.

The defendants appealed, and the appeal was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ.A., on the 12th of November, 1895.

Lash, Q. C., for the appellants. The cases relied on turn on estoppel, and depend on the wording of the certificates, which in those cases shewed absolute ownership. Here the certificate in question was true, and the change in title took place afterwards, and notice was given that there could be a transfer only on the books of the company. The transfer of the certificate effected nothing: R. S. O. ch. 157, sec. 52; *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618. Such a certificate is not negotiable: *Williams* v. *Colonial Bank*, 38 Ch. D. 388, and confers no right of action. The addition of the words, "on surrender, etc.," does not create any liability. That is simply for the company's protection, and they may waive it.

J. W. Hanna, for the respondent. The company are estopped from disputing the correctness of the certificate. They permitted the certificate to remain outstanding when they should have insisted on its surrender. The words in question are calculated to mislead the purchaser. He was entitled to rely on the nonsurrender of the certificate as shewing that the shares had not been transferred; and the judgment is fully supported by the cases cited.

Lash, Q. C., in reply.

January 14th, 1896. Burton, J. A.:—

I was unable to follow the contention of the plaintiff's counsel on the argument, that on the day when the plaintiff demanded a transfer of the shares mentioned in the

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BURTON, J.A.

certificate, there was still stock sufficient to satisfy his demand, or at least 20 shares out of the 22. A subsequent careful examination of the evidence, not only fails to satisfy my mind that there was, but leads me to a very clear conclusion the other way. Neither was there any foundation for the opinion of the president in the statement attributed to him, that there had been an over issue of stock; it was a very natural suspicion on his part on first becoming aware of the fraud practised on the plaintiff, although, so far as the evidence discloses, it has no foundation. It would have been quite immaterial in the present case, unless it was proved that the plaintiff's shares were part of that illegal issue.

White had at one time a very large holding, reduced previously to the 14th of January, 1893, to 238, and on that day he transferred 176 to the Walkers, reducing his holding at that time to sixty-two.

This was also the state of things when White pledged the certificate with the plaintiff on the 3rd of April, 1893.

At the time of the cancellation, which resulted in the issue of a certificate or certificates for the aggregate amount of 238, one certificate which ought then to have been cancelled, was said to be missing, and was presumably retained by White and fraudulently used by him as evidence of his ownership of 20 shares which he sold to Hunter.

It was unnecessary for him to have done that, as he was at that time the apparent owner on the register of 62 shares and no more.

Whether he induced Hunter to purchase by the production of a certificate which should have been cancelled, or by a false representation that he had lost the certificate, which in fact he had handed to the plaintiff, the fraud upon the plaintiff was equally the same; but it was a fraud for which the company would not and ought not in reason or justice to be responsible; but whichever fraud was resorted to, Hunter thereby became proprietor of 20 shares of stock, reducing White's holding to 42.

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In the December following, he sold 2 additional shares, leaving him the owner on the books of the company of 40 shares, which are the 40 shares he sold to Ellis in January, 1894.

So that from the 3rd of April, 1893, to the 2nd of January, 1894, the plaintiff, if he had applied to the company, would have been entitled to and would no doubt have been permitted to complete the transfer of the 22 shares mentioned in his certificate into his own name.

The question, therefore, would seem to turn upon the effect of the certificate.

That certificate when issued contained a correct statement of fact, that Henry F. White (the party through whom the plaintiff claims), was entitled to 22 shares of $25 each of the capital stock of the defendant company, transferable only on the books of the company in person or by attorney on the surrender of the certificate, and on the back was this indorsement :—

For value received, I hereby sell, assign and transfer to H. D. Smith, twenty-two (22) shares of the within stock, and do hereby constitute and appoint him my attorney, to transfer the same on the books of the company.

The Act under which the company is incorporated, requires that the stock shall be transferable in such manner only as the Act requires, and enacts that no transfer shall be valid for any purpose whatever, save only as exhibiting the rights of the parties towards each other, until entry thereof has been duly made in the books of the company ; and this was made known to the plaintiff on the face of the certificate itself.

So far as that certificate relates to the representation of a certain state of facts, and that representation was acted upon by any one to his damage, it could scarcely be contended that the company was not estopped from denying that the facts were as represented. Here the representation was that at that time White was the owner of 22 shares, and whether true or false, the company was estopped from denying the fact. That is the only representa-

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tion of fact contained in the certificate; but it goes on to give notice to White that those shares can only be transferred on the books of the company, and a warning that if he wishes to transfer he must bring the certificate with him, as the company was under no obligation to allow the transfer except on the surrender of the certificate.

It may be said that having inserted those words in the certificate, the company should have been careful to see that on each transfer the previous certificate was cancelled, as the omission to do so might place it in the power of a dishonest man to commit a fraud; but the question is whether in this case it furnishes any right of action against them; and I must confess that I am at a loss to discover any principle upon which such an action can be maintained.

The cases cited, and more especially *In re Bahia and San Francisco R. W. Co.*, L. R. 3 Q. B. 584, merely affirm the doctrine as to estoppel upon the well-known principle of such cases as *Pickard* v. *Sears*, 6 A. & E. 469, and *Freeman* v. *Cooke*, 2 Exch. 654.

That case and *Hart* v. *Frontino, etc. Company*, L. R. 5 Exch. 111, would have applied if the plaintiff were seeking to recover by reason of the representation in the certificate being false.

The case of *Shaw* v. *Port Philip, etc., Company*, 13 Q. B. D. 103, carries the liability of joint stock companies a long way, but it proceeded, if the facts warranted the conclusion, upon a very intelligible ground, that a company is responsible for the fraud committed by its agent acting within the ordinary scope of his employment.

Again I have to say that no fraud was established here in the granting of the certificate.

The fraud consisted in the defendant White as an individual, and not the secretary of the company, selling and transferring to a *bonâ fide* purchaser shares which he had already agreed to dispose of to the plaintiff.

The case of *Williams* v. *Colonial Bank*, 38 Ch. D. 388, is in some respects similar to the present, the certificates

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that were there in question being similar to this one in providing that the shares should be transferable only on the books of the company on the surrender and cancellation of the certificates; but the decision in that case does not touch the point we are asked to consider.

When, if at any time, did any right of action accrue to this plaintiff? Until the company did something which they ought not to have done, or omitted to do something which they ought to have done as between them and the holder of the certificate, no cause of action would arise. I have pointed out that no one was hurt by the certificate, which was true in every respect, and if the plaintiff had, within a reasonable time, attended to have the shares transferred, they would have been transferred; but when he actually applied in February, 1894, many months after the transfer of the certificate, to have them transferred, there were none to transfer; but how did any cause of action arise thereby to this plaintiff? The certificate was not a negotiable instrument; a complete legal title to the shares could not be acquired without a transfer on the books; the certificate was mere evidence that the person mentioned in it was entitled to the number of shares mentioned in it; the plaintiff as the holder of it, might maintain an action against the company, if they, without just cause, refused to allow a transfer, but they had just cause in this case as the legal holder White had already transferred them.

The object of the certificate is to save the shareholder trouble when he wishes to dispose of his shares; and any person purchasing shares without having the certificate produced to him, is put upon enquiry, but the subsequent purchasers here would, upon enquiry, have found that the shares still stood in the name of White, and that they could, therefore, safely go on and complete their purchase. The company might have insisted on the production of the certificate before allowing the transfer, but I think they were not bound to do so, and they were under no obligation to this plaintiff of whose claim they knew nothing

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until he chose to call to have the shares transferred. The transfer made to him was, by the very terms of the statute, invalid as against the company. The plaintiff chose, at the request of White, not to have a proper transfer made, and he has been made to suffer; but his remedy is not against the company who have been guilty of no wrong.

I think that the appeal must be allowed, and the action dismissed.

OSLER, J. A.:—

No imputation is made upon Hunter's good faith, though no explanation was offered as to the nonproduction of the certificate when the stock was transferred to him in the books, or of the circumstances under which he bought from White.

The plaintiff contends that as between himself and White he acquired by virtue of the assignment of the 3rd of April, 1893, endorsed on certificate number 47, a right to have 22 shares of White's stock transferred to him, and that the defendants, who by that certificate represented that White had that number of shares, are bound to give them to him, and to complete his title by making the necessary entry in their books, or if they are unable to do that by reason of White having already transferred all his stock on the books, and there being, therefore, nothing left to answer the certificate, are bound to pay as damages the value of the shares.

It is, I think, not material that the assignment to Hunter happened to be endorsed upon the old certificate number 47. It was as between White and Hunter a valid assignment, conferring upon the latter the right, if White then owned the shares, to have them transferred into his name on the company's books.

The 52nd section of the Joint Stock Company's Letters Patent Act, R. S. O. ch. 157, enacts that no transfer of stock, unless made by sale under execution or under the

order or judgment of some competent Court, shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, and as rendering the transferee liable *ad interim* jointly and severally with the transferor to the company, until entry thereof has been duly made in the books of the company.

Judgment.

OSLER, J.A.

I do not understand that by this it was intended to provide that no action could be maintained against the company to compel them to make a transfer on their books to a person who had acquired an inchoate title to the shares by assignment from the legal owner, and thus to complete his title to the shares so assigned, and the question therefore is, whether the plaintiff when he presented his certificate 47 and required the shares to be transferred to him had a present absolute right to have that done. The answer to this depends in my opinion upon whether White had at that time a sufficient number of, or any, shares remaining at his credit on the company's books which could be transferred under the power of attorney which he had given to the plaintiff. Share certificates are not negotiable instruments, passing the title to the shares by their mere delivery, nor do they purport to be so. The certificate issued by the company stated that White was entitled to 22 shares, transferable only on the books of the company (as the statute provides), and adding, "in person or by attorney on the surrender of the certificate." The latter provision is not required either by statute or by the by-laws of the company (which we called for), and it has been held in more than one case, that the stipulation is one which the company may waive if satisfied otherwise of the right of the transferee to be registered. In other words, the title of the transferee, or rather his right to have his transfer registered or entered, and thus to have his legal title perfected, does not depend, in the case of shares of the character of those we are now dealing with, upon his possession of the share certificate: *Shropshire Union R. W. Co.* v. *The Queen*, L. R. 7 H. L. 496, 509; *Société Générale de Paris*,

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v. *Walker*, 11 App. Cas. 20, 29; Lindley's Law of Companies, 5th ed., pp. 477, 490.

On the face of the plaintiff's certificate there is no other representation than that White was then the holder of the number of shares mentioned therein: see *per* Lord Cairns in the *Shropshire* case. There is no warranty that his title would continue or representation that the holder for the time being would, by merely having it in his possession, become entitled to the shares: *Williams* v. *Colonial Bank*, 38 Ch. D. 388, 400. The certificate purports to shew the legal and not the equitable title, and if persons are content to deal on the faith of the certificate with the registered holder without enquiring into the beneficial ownership and without obtaining a legal title by transfer they may find themselves ousted by an earlier equitable title: Buckley's Companies Acts, 6th ed., p. 94; see also p. 457.

Everything stated in the certificate was true when it was issued, so that as said by the Court of Appeal in *In re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618, the plaintiff's cause of action must be looked for outside the certificate, and upon the assumption that the company cannot dispute the facts stated therein. In what respect then has the company failed in its duty to the plaintiff if the whole of White's stock had been transferred in their books at the time when the plaintiff produced his power of attorney and required it to be acted on? If the transfer to Hunter—earlier than the plaintiff's transfer—could be shewn to be invalid the plaintiff would have made one step in the direction of proving his case, but if Hunter's right did not depend upon the possession or surrender of the certificate afterwards transferred to the plaintiff, or of any certificate (and the shares themselves not being numbered the assignment of them was not connected with any certificate otherwise than by being endorsed thereon), I cannot see how his title can be successfully impeached. Twenty shares generally were assigned to him, and were duly transferred without fraud on his part into his name

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in the books of the company. When the plaintiff took his assignment and power of attorney on the 3rd of April, 1893, the whole of White's shares were still at his credit in the company's books and the shares assigned to him might, had he so desired, have been duly transferred to him, and his title thereto perfected under the 52nd section of the Act. By his own laches he enabled the holders of other assignments to register before him, so that when he came forward the whole of White's holding had been exhausted, the legal title having passed into the hands of other *bonâ fide* purchasers.

I may add with reference to what is said by one of the Law Lords in *Colonial Bank* v. *Cady and Williams*, 15 App. Cas. 267, as to the effect of a somewhat, though not exactly, similar provision in the share certificates there in question, with regard to the surrender of the certificate, and as to the certificate being thereby inseparably connected with the transfer, and so preventing the dishonest creation of a legal right by a transfer to one person and a competing equitable right by deposit of the certificate with another, that the Court was there dealing with foreign share certificates, the transfer of which was a good assignment of the shares, passing a title to them both legal and equitable as between the parties, though as to the company the transferee was not recognized as a shareholder until the transfer was entered in their books. If no title as between the parties can be made so as to entitle a transferee to register except upon production of a certificate, then the plaintiff ought to recover, because if that were the case the transfer to Hunter should not have been made in the books ; but if that, as I think, be not the case, he must fail, because Hunter's transfer was lawfully entered in the register, and the plaintiff did not acquire the certificate and assignment until after Hunter's right to have it so entered was acquired.

The law in America is different: *Smith* v. *American Coal Co.*, 7 Lans. 317 ; *Cushman* v. *Thayer Manufacturing Co.*, 76 N. Y. 365 ; *Bank* v. *Lanier*, 11 Wallace 369 ; *Moores* v. *Citizens Bank*, 111 U. S. 156 ; Cook on Stock and Stockholders, 3rd ed., sec. 351.

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MACLENNAN, J.A.

MACLENNAN, J. A.:—

I think that this appeal should be allowed.

In *In re Bahia and San Francisco R. W. Co.*, L. R. 3 Q. B. 54, and *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, it was decided that the very purpose for which such a certificate as the one in question here is given is to enable the person to whom it is given to sell his shares, and it has accordingly been uniformly held that a company is estopped from saying that a certificate so granted is not true. No question of that kind arises upon this certificate, because at the time it was issued it was in fact true. White was on the date of the certificate, the 28th of January, 1893, in fact entitled to 22 shares of the company's stock, as mentioned therein, and he continued to be so entitled afterwards and until the 3rd of January, 1894, when he transferred 40 shares, which were all he had left, to one Ellis.

The certificate contains the words, "transferable only on the books of the company in person or by attorney on the surrender of this certificate." The plaintiff's contention is that no transfer of these shares could be validly made without surrender of the certificate, and that the transfer to Ellis was invalid to the extent of 22 shares, because White had not the certificate to produce, and did not produce it, for surrender, when that transfer was made. And the question is, what is the meaning and legal effect of the stipulation in the certificate above quoted? Section 41 of the Act, R. S. O. ch. 157, under which the defendant company is incorporated, enacts that the stock of the company shall be transferable in such manner only and subject to all such conditions and restrictions as by the Act or the by-laws of the company may be prescribed; and section 50 requires a book or books to be kept to record the names and addresses of all past and present shareholders, with the number of shares held by each, and also all transfers of stock in their order as presented for entry, with dates and

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other particulars. By section 53 these books are to be open for the inspection of shareholders and creditors. By section 52, until entry in the books, no transfer, with certain exceptions not here material, is to be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, and rendering them liable to creditors.

I think it clearly follows from these enactments, and from the terms of the stipulation in the certificate, that when, on the 3rd of April, 1893, White executed the assignment of 22 shares to the plaintiff on the back of his certificate, the plaintiff did not thereby become a shareholder. He merely acquired a right to go to the company's office, and to have a proper transfer made in the books of the company. As between him and White, it gave him the right to have a proper transfer made in the company's books, but the certificate itself distinctly notified him that no valid assignment could be made elsewhere, or otherwise, than in the company's books.

Now let us see what afterwards took place. On the 3rd of April, when the plaintiff got his transfer, White had 62 shares standing in his name. On the 22nd of June he transferred 20 shares to Hunter; on the 26th of December, 2 shares to Letts, and on the 3rd of January, 1894, 40 shares to Ellis, thus disposing of the whole 62 shares. On none of these occasions was the certificate for 22 shares produced. It is not alleged that the company had any notice of the plaintiff's claim, and no enquiry appears to have been made for the certificate. Was the company bound to refuse, or could they lawfully refuse, to transfer without the production of it? It is not necessary to decide that they could lawfully refuse, but I think it is clear they were not bound to refuse. The shares were standing in White's name; there had been no transfer made in the books; there could be no valid transfer made elsewhere; a transfer on the back of the certificate could be no better than if made by a separate document. The certificate itself could be of no value

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to any one else. It was not negotiable, and I confess I see no obligation, nor any good reason, why the company should think it necessary to insist on its production. I think *Williams* v. *Colonial Bank*, 38 Ch. D. 388, is a decision in favour of the defendants, and the other cases cited do not help the plaintiff, for they were cases of estoppel, and only went to hold companies bound by their certificates, even when they were not true. Here the certificate was true, and the plaintiff might have had his shares if he had applied in due time, and might have had a transfer made in the company's books. The company has done him no wrong, and his only redress must be sought against White, who has defrauded him.

I think that the appeal should be allowed, and that the action should be dismissed with costs.

HAGARTY, C. J. O. :—

Our Act does not contain any provision like section 31 in the English Joint Stock Companies Act, 25 & 26 Vict. ch. 89, that a certificate under the company's seal specifying any share or shares of stock held by any member shall be *primâ facie* evidence of the title of the member to the share or shares of stock therein specified.

The shares in this certificate are not numbered, as appears to be general in England, but the certificate is numbered 47.

It was not till February, 1894, that the plaintiff presented this certificate and transfer by White to the company and required them to enter him as holder, etc. He then discovered that White then held no stock, having disposed of all he held, and the company refused to register him as holder. The company's books were produced ; the book had the stub of this certificate 47 duly in it.

In August, 1893, White, the secretary, got into trouble and was afterwards tried and convicted on a criminal charge for defrauding the company.

In February, 1893, he executed a transfer of 40 shares

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HAGARTY, C.J.O.

to a Mr. Ellis and registered it. This would exhaust (with plaintiff's 22), all of his 62 shares. This Ellis certificate would be number 46.

The claim arises from White's fraud, and the plaintiff's damage in consequence of the company having allowed transfers to be made by him of stock beyond the amount he actually owned without reserving stock to meet the 22 shares mentioned in their certificate number 47, which had been assigned to the plaintiff, and, as he understood it, only transferable "on the surrender of this certificate."

The company urged that the loss was caused by his own delay from April, 1893, to February, 1894, nearly ten months. But the plaintiff's delay is reduced to the space from 3rd of April to 23rd of June, as after the latter date there was no stock held by White applicable to the plaintiff's certificate and no consequent damage to the company.

Mr. Lash argued for them that the words as to the surrender of the certificate were there only for protection of the company and they could waive its production and transfer legally without it.

I hardly think this view can be upheld. Any holder of such a certificate would naturally think himself safe so long as he held this certificate.

No question appears to have been raised below or in the reasons of appeal as to the absence from our Act of many of the specific provisions of the Imperial Act as to the effect of these certificates, or the numbering of shares, or as to the by-laws of the company.

It seems to me that the defence rests on the ground that the company was not estopped from allowing transfers without the production of the certificate, or against denying that White held stock to the amount mentioned in this certificate number 47.

I do not think we can hold that there was any such delay on the plaintiff's part as to destroy his claim.

The case of *In re Bahia and San Francisco R. W. Co.*, L. R. 3 Q. B. 584, approved of in *Hart* v. *Frontino, etc., Company*, L. R. 5 Exch. 111, sets forth the law very clearly

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under the English Joint Stock Companies Act. There the certificate had the numbers of the shares, but it contained no statement as to the surrender of such certificate on a transfer.

Cockburn, C. J., says (p. 594): "This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once shewing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares."

Blackburn, J., follows to same effect and considers that there is an estoppel on the company on the principle of *Freeman* v. *Cooke*, 2 Exch. 654.

It would have been much safer for the company to have numbered the shares. But they issued this certificate intending it to be acted upon, and with the stub in their books could have readily protected themselves. I think they cannot now be heard to deny their own representation.

Shaw v. *Port Philip, etc., Co.*, 13 Q. B. D. 103, shews the liability of the company for the act of the secretary in giving a certificate where he forged the name of the director approving thereof.

In *Colonial Bank* v. *Cady and Williams*, 15 App. Cas. 267, the share certificates were, as here, transferable in the books of the company only on the surrender and cancellation of the certificate by an indorsement thereon. Lord Watson says (p. 275): "The system thus adopted has the merit of inseparably connecting the certificate with the transfer and so preventing the dishonest creation of a legal right by transfer to one person, and a competing equitable right by deposit of the certificate with another."

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HAGARTY, C.J.O.

And again at p. 277: "It would be more accurate to say that such delivery (*i.e.*, of certificate and transfer) passes not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

A case of *In re Building Estate Brickfields Company, Parbury's Case*, [1896] 1 Ch. 100, decided recently by Williams, J., is very important as shewing how estoppel arises on a certificate granted by the company in the hands for value of an innocent holder. He follows the decision in *In re British Farmers Pure Linseed Cake Co.*, 7 Ch. D. 533. He quotes the language of James, L. J., p. 538, speaking of a certificate of shares paid up: "The section does not in the slightest degree alter the general law of the land as to the effect of the conduct of a (? or) representation by companies, or companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them, or by the officers to whom they have entrusted the management of their affairs." And Thesiger, L. J., says it is clear the case comes within the general law of estoppel.

Williams, J., fully adopts this view of the law.

White had 62 shares represented by the two certificates 46 and 47, dated 28th of January. But it appears that he had a month before issued a certificate number 27, dated December 3rd, signed by himself and the president. On the back of this he transfers the 20 shares to John Hunter on the 4th of March, 1893, and in June this stock is transferred in the books to Hunter, and ultimately to the president, and it is said the certificate was left in the office. The certificates 46 and 47 exhausted all his 62 shares, so in effect the dealing with Hunter was a fraud.

I cannot understand why the company could not readily by adhesion to their own declared rule, have refused any transfer of stock while their books shewed certificates duly mentioned covering all the stock really held by their secretary.

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HAGARTY, C.J.O.

The president calls it an over issue of stock; and that White himself in June transferred 20 shares to Hunter in the books.

Who is to suffer for this? The company trust their secretary. He thus has the chance of defrauding one of three people. The sufferer is the plaintiff.

The public notice that surrender of the certificate was a condition precedent to transfer, which the plaintiff or any other assignee and holder might naturally rely on; and this certificate is, by their officer's fraud, made the means of defrauding the man who trusted to it.

I think he reasonably so trusted, and that the company should bear the loss to him.

I consider it most blameable carelessness in not taking care that stock should be always available to meet all outstanding certificates duly registered as issued in their books.

The estoppel arises on their refusal to assign or transfer shares to the plaintiff, and they cannot be heard to say there was no stock to meet his certificate.

Appeal allowed, HAGARTY, C. J. O., *dissenting.*

COBBAN V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Release—Reduced Rate—51 Vict. ch. 29, sec. 246 (D.)—Findings of Jury—New Trial.

A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the allowance of a reduced rate of freight not to hold the company liable.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, followed.

Where the jury find negligence and then define the negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings.

Judgment of the Common Pleas Division, 26 O. R. 732, affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division, reported 26 O. R. 732.

The action was brought to recover damages for the loss, through the alleged negligence of the defendants, of a quantity of plate glass, forwarded from Montreal by the defendants' line of railway for delivery to the plaintiffs in Toronto. The plaintiffs' Montreal agents, who were brought in as third parties, signed a shipping bill, absolving, in consideration of a reduced rate of freight, the defendants from liability for negligence, and the main question on the appeal was the effect of this release. Questions also arose as to the effect of the jury's findings. These findings are set out in the report below, and the facts are there more fully stated, and the line of argument indicated.

The appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 2nd and 3rd of December, 1895.

W. Nesbitt, and *A. MacMurchy*, for the appellants.
Thomson, Q.C., and *J. B. Holden*, for the respondents.
Fullerton, Q.C., for third parties.

Judgment.

HAGARTY, C.J.O.

January 14th, 1896. HAGARTY, C. J. O.:—

I must consider myself bound by the decision in *Vogel* v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, that the company could not, under the circumstances of that case, contract themselves out of liability for proved negligence.

I must admit that I entertain serious doubts whether, where tariff charges by a railway company are fixed and approved by the Governor-General in Council, and a contract clearly entered into that in consideration of a substantial reduction in the allowed freight the shipper or owner shall take upon himself all risks from negligence in carriage (except wilful defaults), such a contract should not be lawful and binding.

I am unfortunately unable to follow the reasoning in the Court below to the effect that the defendants failed to establish that the goods were carried at a reduced rate in consideration whereof the owner took the risk. But I am not expressing any decided opinion on this point as the case has to be submitted to another jury, and I do not wish to be understood in deciding the question one way or the other. The learned Chief Justice says: "It was proved that the plaintiffs were aware of the two rates, and assented to the terms on which the lower one was granted, believing that the proviso absolving the company from liability for negligence was not binding upon them."

I am unable to accede to the defendants' argument that the jury having found negligence, and being asked to specify in what it consisted, and out of (say) five grounds of negligence urged by the plaintiffs, found two out of the five, saying nothing about the other three, we must necessarily treat the finding as an acquittal on the other three grounds.

I may agree with the view of my learned brothers in the Common Pleas Division, that the evidence did not duly support the findings on the grounds of negligence, but as they considered that there was evidence proper to be submitted to the jury on the other grounds on which the

findings were silent, I think they had the discretion to direct a new trial on the whole case, and that it was not one in which they could properly direct a verdict for the defendants.

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HAGARTY, C.J.O.

As to the third parties, the trial Judge found that they were the authorized agents of the plaintiffs in executing the release or special contract. This agency was never seriously disputed.

No direction is given below as to the third parties. It seems unnecessary to continue them on the record in any further proceedings.

BURTON, J. A.:—

One of the greatest improvements in legal proceedings among the recent changes was the power given to the Court to submit facts only to the jury in the form of questions, and upon the answers to those questions for the Court to apply the law; and I must confess that I should regret to see the value of that system frittered away, by the Court putting a strained or unnatural interpretation upon the language used by the jury in their answers.

If this case had been tried by a Judge, and he had said I find the defendants guilty of negligence, such negligence consisting of two things, specifying them, would any one dream of saying that because he had not expressly negatived any other negligence he had not intended to do so? Why should a different rule be applied to that language when used by a jury?

We have in this case a rather extraordinary state of things.

The trial Judge rules that there is evidence for the jury of negligence on these two points, among others; it is left to the jury, therefore, to say whether there was negligence in any of them, and they find there was as respects two.

If the learned Judge had stated to the jury: At present I incline to think that there is evidence for you of negligence upon these two points as well as the others I have

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BURTON, J.A.

mentioned, and I shall therefore leave it to you to deal with them, reserving to myself the right to further consider the question when judgment is moved for, and upon further consideration he had come to the conclusion that there was no proper evidence, it would have been competent to him undoubtedly to direct judgment to be entered for the defendants.

The Divisional Court, as they had a right to do, have come to the conclusion that there was no evidence.

But the plaintiffs when they came to that conclusion were placed in a very disadvantageous position; the judgment being in their favour, they were not called upon to move, and could not have moved, for there was nothing to move against. When, therefore, that Court came to the conclusion that there was no evidence to sustain the negligence found, they naturally felt it to be right to examine the rest of the evidence, and if upon that examination they came to the conclusion that there was very strong evidence of negligence which seemed in their opinion to call for a different verdict, that discretion ought not to be interfered with.

I join, therefore, in dismissing the appeal.

OSLER, J. A.:—

I do not wish to repeat what I said in *Vogel* v. *Grand Trunk R. W. Co.*, 10 A. R. 162, and *Robertson* v. *Grand Trunk R. W. Co.*, 21 A. R. 204, as to the power of a railway company to contract itself out of liability for negligence in the carriage of goods received by it to be carried as a common carrier. I therefore refer to those cases for the expression of my views on that question, merely adding that in the decision of *Vogel's Case* was involved the very same point which we have to deal with here, though it is not presented in quite the same way upon the evidence, viz., whether the offer and acceptance of an alternative or reduced rate makes any difference. I have ventured to hold the opinion that it does not, relying upon the differ-

ence between the language of our Railway Act, and of section 7 of the Imperial Railway and Canal Traffic Act, the latter enabling the company to make a special contract with just and reasonable conditions, while ours contains an absolute denial of power to escape from liability for negligence. It may not be out of place to remark that *Vogel's Case* stands affirmed by the Supreme Court, 11 S. C. R. 612 ; see also *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R., at p. 551, and that its effect as a decision cannot, so far as this Court and lower Courts are concerned, be impaired or diminished by weighing, much less by counting, judicial opinions opposed to it.

The defendants then are shewn to have received the goods in question as common carriers, and the Court below while holding (and I agree with them) that there was no evidence of negligence on the only questions on which the jury found that they were negligent, have granted a new trial. No reasons are given for taking this course and the only conclusion I can come to is that the new trial was granted as a matter of discretion under all the circumstances. The plaintiffs contended that they were entitled to have the judgment entered in their favour on the finding in answer to the first question, that the defendants were guilty of negligence. But it would not be right to say that the jury have found negligence generally. They have not. The learned Judge exercised his right to put questions to the jury, thus taking away their power to find generally for plaintiff or defendant, and the finding as to negligence cannot be dissociated from the answer to the second question which explains and qualifies the first by shewing in what particulars the negligence consisted. The latter finding having properly been held to be against evidence the first finding falls with it, and therefore nothing remains on which the plaintiffs can have judgment. In that state of things the defendants say that they are entitled to judgment, and, logically, I think their contention is right, and that judgment might properly have been so entered either by the trial Judge or by the Divisional

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Court, because the finding on the second question does inferentially negative the existence of other grounds of negligence, and the plaintiffs rest their case on negligence alone, and give the particulars of the negligence they rely on. It has not been usual to ask a jury expressly to negative all other grounds of negligence than those they specify in their answer, indeed I am not aware of any case in which it was done, and I do not wish to cast any doubt upon the power of the Court to have given judgment for the defendants upon the record as it stood. But, upon the whole, I am not prepared to say that the course which has been adopted of granting a new trial was not under the circumstances the best and most prudent, and I therefore agree that the order directing a new trial should not be disturbed.

As to the third parties, Thompson & Co.:—they have been continued in the appeal, I think needlessly, as no one complained in the Divisional Court of the finding at the trial in their favour.

MACLENNAN, J. A.:—

I am of the same opinion.

Appeal dismissed.

LONG V. CARTER.

Principal and Agent—Bankruptcy and Insolvency—Assignments and Preferences—Trust.

When an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable against the agent's assignee for the benefit of creditors, even though the agent has, while purchasing for the principal, also purchased goods of the same kind for himself and has not set aside specific portions of the goods to answer the principal's claim.

Harris v. *Truman*, 9 Q. B. D. 264, applied.

Judgment of ROBERTSON, J., affirmed on other grounds.

Statement.

THIS was an appeal by the defendant from the judgment of ROBERTSON, J.

The defendant was the assignee for the benefit of creditors of Smith Bros., who carried on business as manufacturers of woollen goods and dealers in wools.

The plaintiffs were wool merchants, and brought the action to recover a large quantity of wool in the possession of the defendant, alleging that it had been purchased by Smith Bros. as their agents with their money, and for payment of $200.01, moneys of theirs in Smith Bros'. hands at the time of the assignment.

The action was tried at Hamilton, on the 8th of May, 1895, before ROBERTSON, J., who gave judgment in the plaintiffs' favour, holding that they were the purchasers of the wool from Smith Bros.

A good deal of evidence was taken and much correspondence between the plaintiffs and Smith Bros. was put in, and there was much discussion at the trial, and on the appeal, as to the nature of the arrangement between the plaintiffs and Smith Bros., but for the purposes of this report it may be taken as proved that the relationship of principal and agent existed. It was also proved that the plaintiffs had, from time to time, sent money to Smith Bros. to be expended in the purchase of wool; that Smith Bros. purchased wool for the plaintiffs and for themselves, and stored it in their warehouse without specifically setting apart any portion as belonging to the plaintiffs; that Smith

Statement. Bros. took wool, from time to time, from the warehouse for their own business; and that at the time of the assignment there was more than enough wool in the warehouse to give the plaintiffs the amount bought on their account. It was also proved that $200.01 of the plaintiffs' funds had not been spent, and that there was at the time of the assignment more than this sum at the credit of Smith Bros. with their bankers.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 12th of November, 1895.

Gibbons, Q. C., for the appellant, contended that the plaintiffs were merely purchasers of the wool, and that the property had not passed, citing *Hanson* v. *Meyer*, 6 East 614; and *Acraman* v. *Morrice*, 8 C. B. 449.

Crerar, Q. C., for the respondents, contended that Smith Bros. were either trustees or agents, and that the defendant, as their assignee, was bound to account: *Lewis* v. *Madocks*, 17 Ves. 48, at p. 57; *Pennell* v. *Deffell*, 4 D. M. & G. 372; Lewin on Trusts, 8th ed., p. 894.

January 14th, 1896. HAGARTY, C. J. O.:—

My impression at the argument was rather in favour of Mr. Gibbons' view, that the property had not passed, and that the relation between the plaintiffs and Smith Bros. was that of vendor and purchaser rather than of principal and agent.

I was impressed by the language of Lord Blackburn, giving his opinion to the House of Lords in *Ireland* v. *Livingston*, L. R. 5 H. L. 395, at p. 408. After holding that it was a case of vendor and vendee, he adds that there might still be consistently, the qualified relation of principal and agent between the parties.

But the case of *Harris* v. *Truman*, 9 Q. B. D. 264, to which we were referred by my brother Osler, very satisfactorily

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HAGARTY, C.J.O.

disposes of the case in favour of the plaintiffs. Even though the actual property in the goods may not have actually passed, as the Court seems to have thought, yet a trust for the plaintiffs was fixed on the goods purchased with their money, and, as between them and Smith Bros., their rights to such goods could not be denied by them or their assignee.

This view is fully in accord with the absolute justice of the plaintiffs' claim in the present case.

As to the $200 of money, the plaintiffs were clearly entitled. See such cases as *Pennell* v. *Deffell*, 4 D. M. & G. 372; *Ex parte Dale*, 11 Ch. D. 772; *Frith* v. *Cartland*, 2 H. & M. 417.

BURTON, J. A. :—

In the year 1894 the firm of Smith Bros. were engaged by the plaintiffs to purchase wool on their account, and were not acting in that year for any other principals, but at one of their places of business had a mill, and it would seem that they used some of the wool so purchased at their own mill, making no distinction between the wool purchased and used in their own business, and that purchased on behalf of their principals.

The first point for consideration is, what was the nature of the contract between the parties? It is contended on the one hand that the wool was not purchased by Smith Bros. as the agents of the plaintiffs, but on their own account, at whatever price they could obtain it for, selling it to the plaintiffs at the end of the business season at seventeen cents to the extent of their advances at that time.

In other words, the appellant would wish us to believe that these plaintiffs entered into the one-sided arrangement to make a loan without interest, and without security, for seven months, which was to be applied in the purchase at the end of that period of so much wool as the advances amounted to, if Smith Bros. were then solvent and in a position to carry out the contract, the

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BURTON, J.A.

wool purchased in the meantime belonging to them to dispose of as they might think proper.

That does not strike one as a very likely contract for business men to enter into, but it is clear, I think, upon the letters, that it was the intention of both parties that the one should furnish funds to be expended by the other in the purchase of wool as agents, their remuneration being the difference between the sums at which they could purchase and the seventeen cents which the plaintiffs were willing to allow, and this is made particularly plain by the plaintiffs' letter of the 18th of May, in which they decline to entertain a proposal to increase the rate, and enclose a cheque for $400 "on account of wool to be purchased for our account," and the reply in which Smith Bros. accept the terms and those of the previous letter to keep the wool insured; and Smith Bros. throughout the correspondence lead the plaintiffs to believe that they are holding the wool for them, and that they had on the 14th of June between 6,000 and 7,000 lbs. in, and the learned trial Judge has expressly found that Smith Bros. were agents merely for the plaintiffs.

It is surely immaterial, once the agency is established, whether the wool was purchased with the actual funds received from the plaintiffs or temporarily from their own moneys or from goods from their store; in either case the wool was from the time of the purchase the property of the plaintiffs, and if the agents who held the property in trust for them wrongfully mixed it with their own, they could not thereby deprive the plaintiffs of their property; for an abuse of trust, as said by Lord Ellenborough many years ago, can confer no rights on the party abusing it, nor on those who claim in privity with him.

It is like the case of trust money mixed in the same heap with the trustee's own money. Although the identical money cannot be ascertained, yet as there is so much belonging to the trust in the general heap the *cestui que trust* is entitled to take so much out, and this is according to the decisions, among others, *Great Western R. W. Co.* v. *Hodgson*, 44 U. C. R. 187, the same at law and in equity, so as to warrant a replevin suit.

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BURTON, J.A.

But this does not appear to me to be a wrongful mixture, but is more like an appropriation by Smith Bros. of part of the plaintiffs' wool.

The agents claim that there must necessarily be a margin of wool on hand beyond what would be sufficient to satisfy the plaintiffs' purchases, and they seem, when appropriating a portion of the purchases to their own use, to have been particular not to encroach upon what would be sufficient to satisfy the plaintiffs' purchases, and although I quite agree that if the assignee's present contention be correct, namely, that the goods were purchased by Smith Bros. for themselves, intending to sell subsequently to the plaintiffs, any statement made by them as to the property in the wool being in the plaintiffs would be quite inoperative, it may be looked at in connection with the other facts as indicating that they at least, as well as the plaintiffs, treated the wool throughout as purchased for the plaintiffs by them as their agents. The same remarks apply to the money.

The question of setting apart therefore has no application in this case. The learned Judge has found that the parties occupied the position of principal and agent, a conclusion well warranted on the evidence.

I am of opinion, therefore, that the judgment appealed from is correct, and should be affirmed, and this appeal dismissed.

Since writing this judgment I have had my attention called to a case of *Harris* v. *Truman*, 9 Q. B. D. 264, the facts of which are peculiarly like those in the present case, and in which a similar judgment was given in the Queen's Bench Division, and in the Court of Appeal, and I may be excused for quoting a passage from the judgment of Brett, L. J., in confirmation of what I have said above as to the construction of the contract (p. 273): "It may be urged," he says, "that this barley was not paid for by the defendants, and that all that was done by the defendants was to advance money to Fairman (here Smith Bros.) to enable him to carry on his business. The more that pro-

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BURTON, J.A.

position is examined the more absurd will it seem to be, for it supposes this state of circumstances, that the defendants were advancing to Fairman for the sake of his business enormous sums of money without any security," and the Court there held that the defendants were entitled to succeed, although the agent had exceeded his authority, and purchased a large portion of the barley on credit.

OSLER, J. A.:—

I do not think the judgment of the trial Judge could be maintained on the ground on which he has placed it, viz., that there was a complete sale of the goods by Smith Bros. to the plaintiffs. But there is another ground open on the evidence on which it may well stand. The whole of the correspondence between the parties must be looked at in order to ascertain the terms on which Smith Bros. were dealing with the plaintiffs in buying the wool, and that which relates more especially to Sarnia house throws a light upon and explains the real terms of the earlier arrangement which had been made in reference to the Dresden branch of Smith Bros'. business—I mean as explaining what the plaintiffs were allowing for the merchantable wool and the washed and unwashed "rejects."

It is to be noted, in the first place, that a case like the present must be dealt with as if it were a contest between the plaintiffs and Smith Bros., for the assignee of the latter stands in no better position than the person he represents, as regards his title. Then I think that when the whole correspondence is attentively considered, the true position of the parties is that the plaintiffs were advancing money to Smith Bros. to buy wool for them, and the reference in the letters of the 15th and 19th of May to selling the wool so bought to the plaintiffs at seventeen cents was merely a mode of providing how the buyers' commission and charges were to be paid. All the expressions in the other parts of the correspondence point most conclusively to the fact that the wool was bought for the plaintiffs, and that to the extent

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OSLER, J.A.

of the advances they made they had an interest in it. The stipulations as to insuring the wool and sending a warehouse receipt are strongly confirmatory of this view. It is almost incredible that the plaintiffs were merely advancing money to Smith Bros. for the purposes of their business without security and without themselves being intended to have any interest in the specific wool purchased with the advances. This, however, is the defendant's contention, and in my opinion the evidence does not bear it out. The relation between the parties was that of principal and agent. The buyers occupied a fiduciary position towards the plaintiffs as regards the wool purchased with their money, and to that extent the wool so purchased was impressed with a trust in the plaintiffs' favour, and the judgment at the trial can be upheld on that ground.

The case of *Harris* v. *Truman*, 7 Q. B. D. 340, affirmed 9 Q. B. D. 264, seems to me fully to support the plaintiffs' case, and meets all the objections which were urged against their right to recover. There, as here, the dispute arose between the trustee for creditors and the persons who had advanced money to the insolvent, in that case to buy barley as in this case to buy wool. It was held that the defendants, who were there the lenders of the money, were entitled to recover, on the ground that the relation of principal and agent existed between the parties; but if not, then on two other grounds, as put by Lord Coleridge, C. J. (p. 268), and relied on in the Court below, the first being that "When large amounts of money are entrusted to a man to buy goods and to carry on a business he becomes a trustee for the person to whom the money belongs, and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity: it applies where the relation of principal and agent in the ordinary sense of the words does not exist. According to this doctrine, where a confidence is created between two persons, and where the one receives the money on the faith that he will do a certain thing, and leads the other who has given the money to understand that the thing has been done, as

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OSLER, J.A.

between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the benefit of the person giving the money. * * The second ground is that a person placed in a fiduciary relation with another may have dealings of his own, and may mix up his own dealings with the dealings on behalf of his *cestui que trust;* but it has been held in courts of equity that when a fiduciary relation has been created in respect of a fund which has been misapplied, and where it cannot be shewn what portion of the proceeds of the fund is really subject to the trust, the trust shall be considered to be attached to the whole of the proceeds, and it shall not lie in the mouth of the trustee to say that any portion of those proceeds is not affected with the trust." I may quote also the language of Brett, L. J., (p. 273), who says : "I think that the equity arises from the existence of certain facts and certain relations between the parties, and I think that where the facts are * * that everything with regard to this barley was to be paid for by the defendants and nothing was to be paid for by Fairman (the debtor), an equity attaches upon those facts, and Fairman was a bare trustee for the defendants. But even if this is not so, I have not the smallest doubt that in equity it would be held that the barley was charged with the money actually paid by the defendants as the price of it."

The facts in our case bring it quite within the principles thus laid down.

I have nothing to add respecting the $200, the unexpended portion of the advances in the hands of the defendant and his assignee; it was the plaintiffs' money.

For these reasons I am of opinion that the judgment is right and should be affirmed.

MACLENNAN, J. A. :—

I am of the same opinion.

Appeal dismissed.

JANES V. O'KEEFE.

Landlord and Tenant—Lease—License—Building over Lane—Covenant to Pay Taxes—Assessment and Taxes.

A lease made in pursuance of the Short Forms Act of specifically described premises contained a provision that the lessee might at any time build or extend any building over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane":—

Held, *per* HAGARTY, C.J.O., and BURTON, J.A., affirming the judgment of MEREDITH, C.J., 26 O. R. 489, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.

Per OSLER, and MACLENNAN, JJ.A., that the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane:—

Held, also, however, that this was at all events a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the Assessment Department, BURTON, J.A., expressing no opinion on this point.

Statement.

THIS was an appeal by the plaintiff from the judgment of MEREDITH, C. J., reported 26 O. R. 489.

By a lease made in pursuance of the Short Forms Act, on the 2nd of February, 1880, the plaintiff's predecessors in title demised and leased to the defendants a parcel of land on Yonge street, in the city of Toronto, the north boundary being a lane, "together with full privilege and power to the lessees * * in any manner they shall see best, and at any and all times during the continuance of the term or terms hereby granted * * to build or extend any building over the lane to the north of the premises hereby demised, so as such building or extensions is or are always nine feet above the level of Yonge street."

The lease contained a covenant by the lessors to renew the lease or to pay to the lessees "a fair valuation of the buildings and improvements which shall at that time be

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erected and made on the lands and premises hereby demised and over the said lane," and contained also a covenant by the lessees "to pay taxes."

The lane was seven feet six inches wide, and one hundred feet in depth, and the fee was vested in the plaintiff subject to the lessees' rights and to rights of way of the occupants of other adjoining buildings. Upon the specifically described premises, a building was erected with an extension over the lane, and the lessees were assessed from year to year for the value of the building including the extension, while the plaintiff and his predecessors in title were assessed for the lane valued as vacant land. After the extension had been built a renewal lease was granted with the same description and covenants.

The plaintiff brought the action to recover a proportion of the taxes for the years 1889 to 1893, paid in respect of the lane, and it was dismissed by MEREDITH, C. J.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 5th of December, 1895.

McCarthy, Q. C., *Johnston*, Q. C., and *N. F. Davidson*, for the appellant. The right to build is more than a mere license. The lease in effect demises a proportion of the space over the lane, and the covenant to pay taxes cannot be restricted to the specifically described parcel: American and English Encyclopedia of Law, vol. 19, pp. 4, 6; *Doe d. Biddulph* v. *Meakin*, 1 East 456; *Saylor* v. *Cooper*, 8 A. R. 707; *Perry* v. *Davis*, 3 C. B. N. S. 769. This right to build is an interest in the land, and the lessees have a taxable interest: *Metropolitan R. W. Co.* v. *Fowler*, [1893] A. C. 416; *Electric Telegraph Company* v. *Overseers of Salford*, 11 Exch. 181; *Taylor* v. *Overseers of Pendleton*, 19 Q. B. D. 288; *Cory* v. *Bristow*, 2 App. Cas. 262. The defendants hold really several strata of the available building space over the lane, and the practical way to work the matter out would be to treat the available space as say ten

feet below the surface, and forty feet above, and to apportion the total assessment on this basis. Argument.

Moss, Q. C., and *W. H. Lockhart Gordon*, for the respondents. The lessees have paid all the taxes assessed against them, and have thus kept their covenant. This is an attempt to get behind the assessment, and the appellants have mistaken the forum: *Canadian Land and Emigration Co.* v. *Dysart*, 12 A. R. 80; *Confederation Life Association* v. *City of Toronto*, 22 A. R. 166. No interest in the lane passes to the lessees; and the covenant does not apply at all to the building over the lane. A mere license or privilege is conferred upon the lessees, and they take no taxable interest: *Watkins* v. *Overseers of Milton*, L. R. 3 Q. B. 350; *London and North-Western R. W. Co.* v. *Buckmaster*, L. R. 10 Q. B. 70, 444; *Bobbett* v. *South Eastern R. W. Co.*, 9 Q. B. D. 424; *Rochdale Canal Co.* v. *Brewster*, [1894] 2 Q. B. 852.

McCarthy, Q. C., in reply. There is an exclusive right of possession of all the space above nine feet from the ground, and this confers an estate: American and English Encyclopedia of Law, vol. 13, pp. 514, 541; *Roads* v. *Overseers of Trumpington*, L. R. 6 Q. B. 56; *Regina* v. *St. George's Union*, L. R. 7 Q. B. 90. The plaintiff was not bound to complain of the assessment. Owning all the land it was immaterial to him how the assessment was apportioned by the assessment department. He is now entitled to recover under his tenants' covenant the share of the taxes for which they are liable as far as he is concerned.

January 14th, 1896. HAGARTY, C. J. O.:—

I think Meredith, C. J., rightly held against the plaintiff on his claim for taxes under the covenant in the lease.

When the first lease was granted, no building was existing over or above the lane or passage.

A privilege or license was given to build over the lane bounding the demised premises on the north, provided

Judgment.

HAGARTY, C.J.O.

the building was at least nine feet above the level of the ground.

This lane or passage was reserved for the use of the lessees and of several other tenants, in whose tenancies the plaintiff was interested.

It would seem to have been wholly optional on the tenants' part to avail themselves of the privilege of so building above the lane. They could remove such building at any time they pleased.

I agree with the learned Chief Justice that the lane was not part of the demised premises in the sense of the extended form in the statute of the covenant to pay taxes.

Certain named premises were demised with the right of extending the buildings thereon over the boundary lane at a minimum height above the ground.

Under this privilege or license, the tenants' buildings might project two or three feet across the lane or all the way across. But, as I understand it, the lane itself up to the nine feet was always remaining as the lessor's property for the benefit and user of all his tenants.

I cannot see why the defendants should be liable on their contract to pay any part of the ground assessment on the nine feet frontage on Yonge street.

The lease provides that if at the end of the term the lessor declines to renew, he is to pay for buildings and improvements at any time erected on lands and premises hereby demised and over the said lane, thus providing for the contingency of the license being exercised.

In fact the tenants were assessed for the erection over the lane, as the assessor says, "as so much extra bricks and mortar." He says he assessed the lane just as so much vacant ground.

I suppose it was in this way that the tenants' land and buildings were assessed extra for the addition to them in size and extent.

It is not an uncommon case in a city where a man owns several tenements, that a lane or approach, common to all the tenants, is made under an archway over which the

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HAGARTY, C.J.O.

front tenement extends. Foot passengers and vehicles have height and space to pass and repass.

In the absence of any express provision to the contrary, I do not see why the ground landlord should not be properly assessable for the land over which the arch was constructed.

It was his freehold, reserved for his tenants, and presumably for his own advantage.

It is probable that if the assessment had been disputed, the result might have been more favourable to the landlord. As the lease reads, there is a mere license to build or extend the house on the demised premises as far as the tenants please over the lane, but until the license be acted on, or if never acted on, the demised premises would be bounded by the lane.

When acted on, and so long as the extension remains there, then the assessor, as I understand it, treated it as so much extension of the house, making it possibly more valuable. But if it fell down, or was pulled down, the tenant need not rebuild or replace it.

It seems to me to be a matter for the assessor to deal with.

I find great difficulty in holding the privilege or license to be tantamount to a demise of the uncertain space in the air, which the tenants elect to use or not, as they please. I can hardly hold it as demised one day, and ceasing to be demised the next day, according to the existence or non-existence of the permitted extension.

But I do not think in the case before us, any omission or neglect in the assessment proceedings, can affect the action on the covenant.

I may mention the case of *Taylor* v. *Jermyn*, 25 U. C. R. 86.

In *Metropolitan R. W. Co.* v. *Fowler*, [1892] 1 Q. B. 165, affirmed, [1893] A. C. 416, Lord Esher gives some instructive remarks as to the surface of land being in one right, and land thereunder used for a railway tunnel in another right. Where there are no such separate interests then

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HAGARTY, C.J.O.

the surface ownership extends to the centre of the earth. Where there are such interests, then both are subjects of taxation—the tunnel being a hereditament.

We can understand also an ownership in the surface, which *primâ facie* would be "*ad cœlum*," with possibly a separate assessable interest a certain height above the ground.

But this case does not depend on such a situation.

I think the appeal should be dismissed.

BURTON, J. A.:—

I do not doubt that plenty of cases may be found where an instrument in form of a license, but giving to the licensee the exclusive possession for a certain time, will be construed as a lease and not as a license or privilege merely; but the question is, how are the words to be construed in this instrument, looking at the whole document and considering the surrounding circumstances at the time when the lease, of which this is a renewal, was first granted.

Notwithstanding the criticism to which the language of this lease was subjected during the argument, I do not see that more apt words could have been used to carry out the intention of the parties, if that intention was, as the learned Chief Justice of the Common Pleas Division has found, to confine the covenant for payment of taxes to the land actually demised, *i.e.*, the fourteen feet seven inches.

At the time the first lease was executed, the premises demised were, beyond all question, the fourteen feet. There was a privilege annexed to that demise, which might or might not be exercised. Until exercised, could there be any doubt as to the extent of the demise?

The description of the demised premises is to the lane. Then the privilege is to build over the lane to the north of the demised premises.

The valuation clause refers not only to the buildings on the land and premises demised, but to those over the lane.

Judgment.

BURTON, J.A.

All these indicate a clear intention to draw a distinction between the demised premises, and those held under the license if exercised.

At the time of the renewal, the building over the lane had been completed, but the lessors do not even then include it in the demise, but leave it as a privilege as before.

I think, therefore, that the conclusion of the learned Chief Justice in holding that the covenant to pay taxes was confined to the taxes on the demised premises, was the correct one, and that he rightly dismissed the action.

It becomes unnecessary, therefore, for me to express any opinion upon the other point as to the assessment being conclusive.

OSLER, J. A.:—

In my opinion an interest in the lane passed to the lessees under the lease, but it is not necessary to discuss that point, for on the other point involved, I am in the defendants' favour. The assessment is, I think, final.

MACLENNAN, J. A.:—

Applying the Act relating to Short Forms of Leases to the lease in question, the covenant of the defendants is to pay all taxes charged upon the demised premises or upon the lessor in respect thereof. The first question, therefore, is, what are the premises demised? The learned Chief Justice decided that for the purpose of the covenant the buildings over the laneway were no part of the premises demised. With great respect, I am unable to agree in that conclusion. The deed uses different language with respect to the fourteen feet seven inches, which were demised without qualification, and with respect to the buildings over the laneway. The first is demised and leased, in the usual terms, with a description by metes and bounds; and the other is included in the subject demised by adding these words: "together with full privilege and power to

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MACLENNAN, J. A.

the lessees, in any manner they shall see best, and at any and all times during the continuance of the term or terms hereby granted; and at any and all times during any further term or renewal to be hereafter granted under and by virtue of these presents, to build or extend any building over the lane to the north of the premises hereby demised, so as such building or extensions is or are always nine feet above the level of Yonge street."

Now whatever this privilege or power may amount to, it is by the express words of the deed part of the subject demised. It demises the land, described by metes and bounds, together with this privilege or power over the adjoining land. The subject demised is, therefore, both the described parcel and the power or privilege over the other parcel. Both are expressly demised. Then what is the nature and extent of this power and privilege, which is expressed to be exercisable at any and all times during the term and any renewals thereof; and which is included in the *habendum* along with the parcel of land? The lease was a renewal of a former lease for a term of twenty-one years, and at the time of its execution, buildings had already been erected by the tenant over the lane in exercise of a similar power contained in the previous lease. Reading the lease with the light of this knowledge, it is not difficult to see what was intended by the parties by this power and privilege; although it is clumsily and unskilfully expressed. The lease contains a stipulation for perpetual renewal, subject to this, that the lessor can refuse to renew on condition of paying the tenant, not merely for the buildings and improvements on the parcel expressly demised, but also for those over the lane. That shews, if any thing were needed to shew it, that the lessees were intended to have the use of the building which they might erect over the lane, in the same way and to the same extent as the buildings upon the parcel expressly described. If that is so, then the effect of the deed is to give the lessees a term in the buildings over the lane, of the same duration and extent as in the other part of the property,

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MACLENNAN, J.A.

and that those buildings are part of the thing demised to all intents and purposes. The respondents' counsel did not dispute that the tenant was entitled to the sole and exclusive use of the buildings over the lane, the same as the other parts of the property; but contended that it was still no part of the demised premises. I think that contention clearly untenable. What ever right they have they derive from the language of the deed, and if that gives them the exclusive use of a tenement for a definite term, it is impossible to say it is not a tenement demised, however informal the language may be by which it is given. The learned Chief Justice thought that because in the proviso for renewal and payment for buildings in case of refusal, the buildings on the lands demised are spoken of as distinct from the building over the lane, that indicated that in the covenant for the payment of taxes the words "demised premises" were not intended to include the latter. I do not think so, and a perusal of the other provisoes and covenants in the lease, I think, shews that it is not so.

I think, therefore, that the defendants have covenanted to pay, and are liable to pay, the taxes properly assessable against the buildings over the lane, as well as against the other parts of the property comprised in their lease, or against the plaintiff in respect thereof.

But the defendants say they have paid all the taxes so assessed, and that is the further question in the appeal. By section 21 (1) of the Assessment Act of 1892, 55 Vict. ch. 48 (O.), when land is owned or occupied by more persons than one, they shall be assessed therefor in the proportions belonging to or occupied by each respectively; and by section 17, when land is occupied by a person other than the owner, it is to be assessed against both. In the present case, therefore, the property comprised in this lease, including the buildings over the lane, should have been assessed against both the plaintiff and the defendants, and also against the under tenants, and the laneway ought to be assessed against the plaintiff alone.

Judgment.

MACLENNAN, J.A.

The lease had the effect of severing, for assessment purposes, the lane and the buildings over the lane, and of dividing them into two separate parcels, and for that purpose they should have been assessed according to their respective values, regard being had to all the circumstances, and not merely valuing the buildings as so much bricks and mortar, as appears to have been done. The value of buildings, situate as the buildings in question, is enhanced by their situation, and includes in it the value of the situation, just as does the value of buildings standing on the ground, allowance being made for the fact that they are an upper story, and not on the street level. The evidence is that the defendants were assessed for the buildings in question, as well as for the other part of the property comprised in their lease; and that the plaintiff was assessed separately for the lane, and the defendants have paid year by year the taxes which were so assessed against their property. It seems, however, that the plaintiff was assessed in respect of the lane for the full value of the ground as vacant ground, while the buildings above were valued as mere buildings, merely at what they cost or were worth as such.

I think that assessment was wrong, but wrong as to amount merely, and could have been corrected at the instance of the plaintiff by the Court of Revision. As it is, the defendants have paid what was assessed against the property, and I think their covenant requires them to do no more.

Looking at the assessment roll, the assessment against the plaintiff on account of the lane cannot be regarded as an assessment against the plaintiff on account of these buildings, as expressed in the covenant, but on account of the lane merely as separate and distinct from the buildings; and therefore the taxes which he has paid, are not within the covenant.

For these reasons, I think the plaintiff's action fails and was properly dismissed.

Appeal dismissed.

MANLEY V. THE LONDON LOAN COMPANY.

Mortgage—Payment of Prior Encumbrance—Interest—Assignment of Mortgage—Purchaser of Equity of Redemption.

When a loan is effected for the purpose of paying off encumbrances, at once or as they become due, at the option of the new mortgagees, and one of the encumbrances, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior incumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagee.

An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as this, charge the mortgagor with the increased rate.

The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees.

Judgment of the Chancery Division affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the Chancery Division.

The following statement of facts is taken from the judgment of MACLENNAN, J. A. :—

This is a redemption action by the purchaser of land from a mortgagor against the assignees of the mortgage from the original mortgagees, another company called the English Loan Company. The mortgage is dated the 1st of December, 1880, made by one Martin, and it is expressed to secure the sum of $1,300, with a proviso to be void on payment of $2,892.20, in twenty equal annual instalments of $144.61 each, on the 1st of December in each year. It contains a proviso giving the mortgagor a right to pay the whole of the principal money at any time on giving three months' notice, by paying all instalments to date, and three months' interest at the rate of nine per cent. per annum. There is a declaration, evidently inserted in conformity with the Dominion Statute 43 Vict. ch. 42, that the amount of principal money secured thereby is $1,300, and that the interest chargeable thereon is at the

Statement.

rate aforesaid. The mortgagor also agrees that neither the execution nor registration of the mortgage shall bind the mortgagees to advance the money. It is also declared that if the mortgagees should satisfy any charge on the lands, the amount so paid should be payable forthwith; and in the event of the money advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the mortgagees should stand in the position of the persons so paid off. And there is a receipt for $1,300 endorsed and signed by the mortgagor, besides the usual receipt contained in the body of the instrument.

The mortgage also contains the usual covenants entered into by a mortgagor for title and freedom from incumbrances. At the date of the mortgage there were two prior mortgages upon the land; one to a company called The Bristol Loan Company for $1,050, with arrears of $80, and another to one Moore, on which there was only a small sum of $53 due. These mortgages were mentioned in Martin's application for the loan, and he thereby authorized the mortgagees to pay them off at once, or to assume and pay them off as they became due, at their option, and to remit the balance to him by cheque. The mortgagees paid the small sum due on the Moore mortgage, but the Bristol mortgage was payable by instalments with interest at eight and a half per cent. per annum, as follows: $50 on the first day of February in each of the years 1880, 1881, 1882, and 1883, and the balance of $850 with yearly interest, on the 1st of February, 1889; and the mortgagees did not then pay it off, but they prepared an account on the footing that it had been paid off, with all arrears, and an alleged bonus also paid to the Bristol Company of $42.38, for accepting payment in advance, and shewing a balance due to them from the mortgagor upon the whole transaction, including expenses, of $31.21. This account the mortgagor signed as true and correct, and he paid the company the balance of $31.21. Afterwards the English Company paid the instalments on the Bristol mortgage as they became due; and the mortgagor made his

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payments to the English Company according to the terms of his mortgage until the 15th of January, 1884, when the plaintiff acquired the equity of redemption subject to the mortgages as they then stood. Before the plaintiff acquired the land, he had applied to the mortgagees for an account of the mortgage debt; and on the 19th of April, 1883, he received a statement from their manager in which they made up the account on the footing of their actual payments to the Bristol Company, charging interest thereon, and treating the Bristol mortgage as still outstanding and unpaid to the extent of $850 and interest thereon, and they make no reference to the account above mentioned signed by the mortgagor, but say that they paid him $307.62, and are paying the Bristol mortgage as it becomes due. On the 1st of May, 1886, the defendants purchased from the English Company a number of mortgages, including the mortgage in question; and the deed of assignment recites that there was then due thereon the sum of $1,192.48, and it contains a covenant by the assignors that that sum was then due and unpaid. It was, however, then made known to the defendants that the whole sum of $1,300 had not been advanced, and that the amount really due was less than the sum so stated in the assignment by the sum still remaining unpaid on the Bristol mortgage. The latter sum was then $850, and interest at eight and a half per cent. from the 1st of February, 1886, $18.06, or altogether $868.06. So that the sum represented to the defendants to be then due, which they paid to the vendors, was $1,192, minus $868.06, or $323.94; and there was no pretence by the vendors that the fifteen instalments which, according to the terms of the mortgage, had yet to mature, amounting to $2,169.15, were due from the mortgagor. After this the plaintiff made one payment to the defendants; and in the month of December, 1887, a dispute arose between them as to the proper mode of taking the account, which ultimately occasioned the present action. In the meantime, however, the plaintiff made a number of payments to the defendants, and the defendants paid the

Statement. interest yearly on the Bristol mortgage, and on the 1st of February, 1889, paid off the balance of principal money thereon, amounting to $850.

The action was tried at London, on the 22nd of January, 1895, before MEREDITH, J., who held that the basis of computation should be the consideration named in the mortgage.

This judgment was, however, reversed by the Divisional Court, on the ground that the defendants had notice from the papers of the true state of the account.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 12th and 13th of November, 1895.

Gibbons, Q. C., for the appellants. The appellants were entitled to rely on the receipt clause, and to assume that the full amount of the consideration had been advanced: *Bickerton* v. *Walker*, 31 Ch. D. 151. Subsequent changes in the account an assignee takes the risk of. The plaintiff has been allowed the full amount of the mortgage on his purchase, and cannot now object.

W. H. Blake, for the respondent. The amount stated in the mortgage is only *primâ facie* evidence, and the defendants should have made inquiry, especially where the mortgage itself provided that the mortgagees were not bound to advance the money: *Mainland* v. *Upjohn*, 41 Ch. D. 126; *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347; and the general rule, that the assignee of a mortgage takes subject to the true state of the accounts, applies: *Matthews* v. *Wallwyn*, 4 Ves. 118; *Walker* v. *Jones*, L. R. 1 P. C. 50; *Chambers* v. *Goldwin*, 9 Ves. 254. The defendants cannot rely on any estoppel as between the plaintiff as purchaser of the equity of redemption and the mortgagor: *Sunderlin* v. *Struthers*, 47 Pa. St. 411. The appellants had notice of the facts and cannot complain.

Gibbons, Q. C., in reply.

January 14th, 1896. The judgment of the Court was delivered by

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MACLENNAN, J.A.

MACLENNAN, J. A.:—

The dispute between the parties is this: The plaintiff claims the benefit of the more favourable terms as to interest contained in the Bristol mortgage while that mortgage remained unpaid, while the defendants claim that benefit for themselves, and seek to charge the plaintiff as if the Bristol mortgage had been paid off on the 1st of December, 1880. The Divisional Court, reversing the judgment at the trial of Mr. Justice Meredith, has decided that the advantage ought to belong to the plaintiff, and not to the defendants, and that is the question in this appeal.

If this had been a question between the original mortgagor and mortgagee, I think it is clear the mortgagor would be entitled to the advantage in question.

It is evident that the account signed by the mortgagor at the time of the making of the mortgage, and with which he expresses his satisfaction, was assented to on the supposition that the company had in fact paid the prior mortgage off. If they had done so, no question could have arisen. In his application he gave them the option of paying it off at once, or as it became due, and in either case any balance was to be paid to him by cheque. No doubt the account was prepared by the company, and the mortgagor's signature was procured to it, on the expectation that the Bristol Company would be willing to accept payment. But it turned out that that company was unwilling to accept payment, and the mortgagees had no option but to pay them off as the instalments matured. Now it may be, having regard to the terms of the application for the loan, that the company could have said to the mortgagor: "The Bristol Company will not receive their money, and we have set apart the rest of our loan to answer the payments as they become due. The money is money of yours in our hands for that purpose, and you

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MACLENNAN, J.A.

must pay us according to the terms of your own mortgage, but we will allow you any interest we can make on your money in our hands until required for payment of the prior mortgage." But they did not do that. They did not treat the money which had not been advanced as the mortgagor's money in their hands, or set it apart for his use, but by the account which they rendered on the 19th of April, 1883, they shewed that they treated the sum, which had not been advanced, as their own money, and only claimed interest from the time when it was actually paid to the Bristol Company; that was the fair and reasonable course to take, and to have taken the other course would have been hard, not to say oppressive, upon the mortgagor, and one which a loan company would hardly consider it wise in their own interests to pursue. If the company intended to pursue the oppressive course, I think it would have been their clear duty to notify the mortgagor thereof, so that he might not remain under the belief that the other mortgage had been paid off, and that he might know, if such was the fact, that he was in truth paying interest twice on the money, namely, eight and a half per cent. to the Bristol Company, and nine per cent. to the English Company; such knowledge would enable him to extricate himself from his position by at once redeeming the mortgage under the provision for that purpose contained therein. I think they treated the authority contained in the mortgagor's application as superseded by the stipulation contained in the mortgage deed, which provided that in the event of the money to be advanced, or any part thereof, being applied to the payment of any charge or incumbrance, the mortgagees should stand in the position and be entitled to all the equities of the persons so paid off; and so in the account which they made up, they claimed interest only upon the sums which they had actually paid on the prior mortgage.

It is clear, therefore, in my opinion, that as between the mortgagor and the mortgagees, the latter could not have claimed interest upon the money paid by them to the

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MACLENNAN, J.A.

Bristol Company but from the date of payment; and the question remains whether the present defendants can stand in a better position than their vendors. We were pressed very much by the appellants' counsel with the case of *Bickerton* v. *Walker*, 31 Ch. D. 151, as entitling them to maintain that the whole $1,300 was advanced to the mortgagor. I think, however, that case does not help them, for they well knew when they bought that a sum equal to the balance remaining on the Bristol mortgage, had never been advanced at all, and that that mortgage was still unpaid. With that knowledge, they bought and only intended to buy, what the English Company had to sell; that is to say, the mortgage debt as it stood as between the plaintiff and the English Company, and that is all they paid for, although the assignment is expressed as if they had paid $1,192. The defendants, therefore, acquired the mortgage subject to the state of the account between the plaintiff and the mortgagees, and must submit to redemption on the same terms as their vendors would have been subject to.

It was further contended by the appellants that inasmuch as the purchase money paid by the plaintiff for the equity of redemption was computed on the theory that the mortgagees could claim payment as if the whole sum of $1,300 had been advanced, therefore he must redeem on that footing. No authority was cited for that proposition; and I do not think the contention well founded. It cannot make any difference to the mortgagees what the plaintiff paid for the equity of redemption, or whether he paid anything for it. That is a matter altogether between the mortgagor and the plaintiff, and is no evidence whatever of what is due to the defendants.

The appeal ought, therefore, to be dismissed.

Appeal dismissed.

MOLSONS BANK v. COOPER.

Collateral Security—Banks—Suspense Account—Estoppel—Creditors' Relief Act.

A mercantile firm obtained by the discount of their own notes and by overdraft a line of credit from a bank "to be secured by collections deposited." They deposited with the bank as collateral security for the advances customers' notes to an amount nearly equal to the advances and from time to time withdrew notes that fell due and on the same terms deposited others. They suspended payment, and the bank obtained several judgments against them on such of their notes as were due and issued executions under which and other executions the sheriff realized and prepared to make a distribution under the Creditors' Relief Act. The defendants then made an application to compel the bank to credit on the judgments moneys collected upon the customers' notes, and an issue was directed, in which it was held that the bank was entitled by virtue of the agreement entered into to hold these moneys in suspense as security against any ultimate loss, and was, therefore, not bound to give credit. Subsequently the bank brought an action on other notes that had matured, having at the time a larger sum in the suspense account than the amount for which action was brought, but less than the total amount of its claim. At this time the sheriff expected to pay a further dividend under the Creditors' Relief Act:—

Held, *per* HAGARTY, C. J. O., and BURTON, J. A., that the bank was entitled to judgment for the full amount sued for, and was not bound to appropriate the moneys collected to that particular portion of the debt:—

Held, also, *per* HAGARTY, C. J. O., and OSLER, J. A., that at all events the judgment in the issue was conclusive upon this question.

In the result the judgment of the Queen's Bench Division, 26 O. R. 575, was reversed, MACLENNAN, J. A., dissenting.

Statement. THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 26 O. R. 575.

The following statement of the facts is taken from the judgment of MACLENNAN, J. A.:—

The plaintiffs were the bankers of the defendants, and on the 13th of June, 1891, had agreed to give them a credit of $150,000, to be secured by "collections deposited" to an equal or nearly equal amount. The meaning of that was made clear by the heading of a pass book between the parties in which were entered particulars of customers' notes belonging to the defendants, deposited with the plaintiffs as collateral security for their advances, and thus expressed: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for

advances made to us by the bank in discounts and over- drafts." This heading was signed by the defendants. The advances were made by discounting from time to time the defendants' own notes. Statement.

On the 24th of August, 1893, the defendants suspended payment. At that time the plaintiffs held ten promissory notes of the defendants maturing at various dates between the 4th of September and the 14th of December following, for the aggregate amount of $145,000, all of which had been discounted, besides which the defendants owed the plaintiffs $1,907 on an overdrawn account. The defendants also at that time held as collateral security, under the agreement above referred to, customers' notes, the property of the defendants deposited with them, to the amount of about $105,000. As the principal notes became due the plaintiffs sued upon them, and before the end of September, 1893, they had recovered five several judgments upon five of the notes for sums aggregating $83,000. The first of these judgments was recovered on the 14th of September upon a note for $30,000 due on the 4th of that month; and in that action they credited the defendants with $6,921.32 which had up to that time been collected on the collateral notes. In the subsequent actions, however, they did not credit the collections which they had made in the meantime on the collaterals, and they issued execution for the full amount of all their judgments.

Under these executions, and executions issued by other creditors of the defendants, the sheriff seized a large quantity of goods and chattels, the property of the defendants, and sold the same and received the proceeds for distribution under the provisions of the Creditors' Relief Act.

On the 4th of October, 1893, the defendants made an assignment of their book debts and credits, etc., except the goods seized by the sheriff, for the equal benefit of all their creditors.

On the 27th of November, 1893, the plaintiffs commenced an action against the defendants upon another (the sixth) note, which had become due on the 22nd of September, for

Statement. $5,000, and also for the sum of $1,907, the amount of the overdrawn account, and that action is still pending.

In the beginning of November, 1893, a contention was made by the defendants, that they were entitled to have credit upon the executions in the sheriff's hands for the money up to that time collected by the plaintiffs on the collateral notes, amounting, as was alleged, to about $47,000, and an application was made to the Court to compel the plaintiffs to submit to such credit being given. On the 29th of December, 1893, an order was made in aid of that application for the trial of an issue, whether before or since the recovery of the judgments the bank had received any payments, which ought to be applied in satisfaction thereof, in whole or in part, and if so, when they ought to be applied, and to what extent.

That issue was tried, and the finding thereon, bearing date the 20th of April, 1894, was that the defendants had not received any payments which they were bound to apply as contended, and thereupon an order was made, bearing date the 23rd of May, 1894, declaring that the plaintiffs, up to the 20th of April, 1894, had not received any payments, which either at the time of the receipt thereof, ought to have been, or at the date of the order, ought to be, applied in satisfaction in whole or in part of the judgments or any of them; and the defendants were ordered to pay the costs of the issue and of the application.

The present action was commenced on the 2nd of June, 1894, and it is to recover the last four of the ten notes, aggregating $50,000, which all fell due in the month of December, 1893; and the defence set up is payment or satisfaction either in whole or in part by the money received by the plaintiffs on the collateral notes. At the trial, on the 18th of April, 1895, it was admitted that the plaintiffs had, up to that time, received upon their collaterals, over and above the sum of $6,920.10, which was credited in the action on the first note, the sum of $82,135, none of which had been as yet applied by them in any way upon the indebtedness of the defendants.

Statement.

Mr. Justice Rose, who tried the action, gave judgment for the plaintiffs for the full amount of the notes sued upon, holding that they were not obliged to credit the money in their hands against the notes in question; and the learned Judge appears, from the notes of the argument before him, to have proceeded upon the ground that the question was *res judicata*, by reason of the order of the 23rd of May, 1894, made upon the issue above referred to between the same parties. The defendants appealed from that judgment, and the Divisional Court set it aside and dismissed the action. The ground upon which this was done was that the plaintiffs having refused to apply the money on that part of the debt already in judgment, must apply it somehow, and therefore must apply it upon the claim in the present action. The present appeal is by the bank from that judgment.

At the time of the bringing of the present action and of the recovery of judgment therein, there were assets in the sheriff's hands, the proceeds of which he expected to distribute under the Creditors' Relief Act.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 14th of November, 1895.

Shepley, Q. C., for the appellants. The doctrine of *res judicata* applies, and the former judgment is conclusive. The respondents cannot again litigate the terms of the agreement, and the rights of the parties under it. The terms of the agreement in fact, and the rights of the parties under it in law, have become, by the previous judgment, conclusively established. It is difficult to understand what view the Divisional Court took, in the present case, of this contention, as, while they apparently concede its correctness, they determine the case without any reference to it. It is possible that they may have thought that the judgment referred to was only an estoppel as to the portion of the principal debt then under consideration.

Argument.

But the agreement controlled the rights of the parties in respect of the whole debt; and the determination of what the agreement was, was a determination once for all, and as to the whole debt. It cannot be that the appellants, whenever they bring an action for an instalment of the debt, are to be bound to litigate the agreement over again: *Concha* v. *Concha*, 11 App. Cas. 541; *In re South American and Mexican Co.*, [1895] 1 Ch. 37; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; Bigelow on Estoppel, 5th ed., p. 702; 2 Black on Judgments, sec. 614; Van Fleet on Collateral Attack, p. 29. But even if the previous judgment does not operate as an estoppel, the judgment appealed from is erroneous on the merits. The proceeds of the customers' paper are a security in the hands of the appellants for such ultimate balance as may remain due, after the appellants have resorted to all their remedies in respect of the principal liability: *Bonser* v. *Cox*, 6 Beav. 84: *Lewis* v. *United States*, 92 U. S. 618; *Commercial Bank of Australia* v. *Official Assignee of Wilson*, [1893] A. C. 181; *Beaty* v. *Samuel*, 29 Gr. 105; *Eastman* v. *Bank of Montreal*, 10 O. R. 79; *Young* v. *Spiers*, 16 O. R. 672; *Ex parte Wyldman*, 1 At. 109, 2 Ves. Sr. 113; *Ex parte Royal Bank of Scotland*, 2 Rose 197, 19 Ves. 310; *Ex parte Reed*, 3 D. & C. 481; *Ex parte Philips*, 1 M. D. & D. 232; Colebrooke on Collateral Securities, p. 136.

Foy, Q. C., and *J. S. Denison*, for the respondents. There is no estoppel. The issues are not identical. The issue in the present case, is whether, now that all the debt of the bank has matured, they can obtain further judgments without first crediting collections made on collaterals. This, it is submitted, is entirely different from the former issue. In the one case it was decided that the bank could not be compelled, after having obtained a judgment for a portion of the debt, to reduce the amount by collections on collaterals held in respect of matured and unmatured paper. In the present action it is quite consistent with that judgment to hold that, in an action for the balance of the whole debt, col-

Argument.

lections upon collaterals deposited in respect of the whole debt must be credited. Any other holding would be most unjust to the respondents, and would be making them liable for an amount which they do not owe. It was in the former issue deemed unfair to the bank to compel them to apply the collaterals, which were not equal to the total debt, in reduction of the judgments, but no unfairness exists now. The reasons given for the former judgment do not bind. Only the formal judgment can be looked at: Freeman on Judgment, 4th ed., p. 443; *Alison's Case*, L. R. 9 Ch. 24; *Houston* v. *Marquis of Sligo*, 29 Ch. D. 448; *Heath* v. *Overseers of Weaverham*, [1894] 2 Q. B. 108; *Brunsden* v. *Humphrey*, 14 Q. B. D. 141; *Commissioners of Leith Harbour* v. *Inspector of the Poor*, L. R. 1 Sc. Ap. 17. The appellants must give credit for moneys in their hands, and that is all that is asked: *Benning* v. *Thibaudeau*, 20 S. C. R. 110.

Shepley, Q. C., in reply.

January 14th, 1896. HAGARTY, C. J. O.:—

The bargain between the parties was clearly proved and admitted. It was one which the parties had an undoubted right to make, and it is for us to find its meaning.

No decision of the Courts on any substantially similar state of facts has been cited to us.

The defendants seem to regard the agreement as if its legal effect was that all moneys received from time to time on the collaterals, should be applied to meet and discharge all moneys then due on the whole account.

The bank insist that such a course would jeopardize or exhaust this collateral fund, and in fact destroy it as a security to them beyond the discounted paper, and as an ultimate asset for resort.

As to the meaning of the word "collateral" in itself, it may be interpreted apparently according to the nature of the dealing in which it is used.

In *In re Athill, Athill* v. *Athill*, 16 Ch. D. 211, it is well

Judgment.

HAGARTY, C.J.O.

discussed. Hall, V.-C., says, that taken by itself it is not equivalent to "secondary" or "auxiliary," or "only to be made use of in aid."

The case seems very clear on its facts, which are very different from the present as to two cotemporaneous mortgages. His decision was affirmed on appeal.

Sir George Jessel adopts his view. He says that there was no contract to the effect that one mortgage must be exhausted before the other; that if the parties meant that they should have said so; that "collateral" by itself does not necessarily mean "secondary;" that it is at all events susceptible of the strict meaning of "parallel" or "additional," and adds: "Why should it have one meaning rather than the other if the nature of the transaction does not require us to depart from its literal meaning? * * There is no doubt upon the authorities that it is a question of construction, of course having regard to the nature of the transaction, and the position of the parties and their dealings with the properties."

Cotton, L. J., is equally explicit. He says that Lord Eldon expressly refused to lay down any rule as to the meaning of "collateral," but went upon the whole of the transaction in determining whether one estate should bear all the burden before the other.

In our case I think we must find out what the parties contracted for, and what they respectively meant and understood as their bargain.

The decision of the Queen's Bench Division directs judgment to be entered for the defendants. This must be on the issue of payment, or rather on the defendants' counterclaim for the moneys received on the collaterals, and on which they claim an account.

As has been already decided in the judgments already recovered no payments have been made out of collaterals (except the sum already mentioned), and it would be now hardly possible to apply the principle of the earliest credits as applicable to payment of the portions of the debt falling due from time to time.

Judgment.

HAGARTY, C.J.O.

I think I must agree with the judgment of my brother Rose on the trial of the interpleader issue. The Divisional Court refer to this as a judgment unreversed and unappealed from and binding as *res judicata*.

But they considered that, however binding up to the time of delivery, it was not so binding as to the note sued on in this action.

I am unable to appreciate the distinction. All these suits have been brought since the assignment by the defendants, and the suit now in appeal was not the final one, as a $5,000 claim was still in suit.

Mr. Justice Rose tried both actions, and in the one now in appeal, followed his ruling in the previous suit, which stands unappealed from.

He has placed a construction on the original contract between the parties which stood unchallenged.

I cannot see why such construction should not also govern this case; and I repeat my inability to understand why it does not apply equally to govern this case.

Apart from any question of *res judicata*, I agree with his construction of the contract which the parties made, and had the right to make.

I think that the appeal must be allowed, and the judgment at the trial restored, with leave to the defendants to move as advised as to the final appropriation of the moneys received by the plaintiffs.

BURTON, J. A.:—

This case is presented in a somewhat different form from that to be found in any of the cases cited, and the main question to be decided is what were the terms of the agreement upon which the collaterals were held?

Those terms are to be found in the letter from the manager of the bank, in which a line of credit to the extent of $150,000 is granted, to be secured by collections deposited —not to the full extent of the advance, but as near it as the borrowers could.

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BURTON, J.A.

The bank then advanced to the defendants from time to time large sums upon their own notes, collaterally secured by the deposit of notes which were entered in a book under this heading: "The notes enumerated in this book are deposited with the Molsons Bank as collateral security for advances made to us by the bank in discounts and overdrafts."

As these collateral notes were about to mature they were withdrawn by the defendants and others substituted.

The rule in equity for the administration of assets is thus defined in *Rhodes* v. *Moxhay*, 10 W. R. 103: "The creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against any securities he may hold, subject, of course, to this qualification, that he must not ultimately receive more than 20/ in the £. To hold otherwise would be virtually to deprive the secured creditor of any advantage from his security."

Now, as I read the agreement upon which the advances were made, collaterals were to be lodged as those advances were made, which, whether in the form of customers' paper or in collections from that paper, were to stand as security for the whole amount of the discounts or overdraft.

The permission to withdraw paper from time to time and to substitute other paper for that so withdrawn was apparently an act of grace, forming no part of the original agreement, but granted to facilitate the debtors' operations, so as not to keep them out of funds, the bank being quite satisfied so long as good collateral paper was deposited with them.

No questions arise in this case, as in so many of the cases cited, where a struggle exists between creditors in bankruptcy, or under our own Insolvent Act when in force, or the Act against preferences; the principle of those Acts being that all creditors are to be put on an equal footing; and therefore, if a creditor chooses to prove, he must sell or value whatever property he holds belonging to the

Judgment.

BURTON, J.A.

insolvent debtor; but even in those cases, if he has the estate of a third person, that principle does not apply, and in case of contract, except in such cases, a Court never interferes with the rights and remedies which a creditor either expressly or by implication secures to himself in that way.

Then does it make any difference as between these parties that the collaterals consist of customers' paper handed to the bank by the debtors? As between them they were to stand as collateral to and security for the principal debt so long as any portion of that debt remained unpaid, and whether due or not due.

In *Commercial Bank of Australia* v. *Official Assignee of Wilson*, [1893] A. C. 181, the debt was secured, as it is here, by guarantors, friends of the insolvent, who afterwards substituted money in place of their personal responsibility, and, as in this case, for a smaller amount than the whole debt; and the Lord Chancellor's remarks in that case seem pertinent: "The bank," he says, "no doubt would be entitled, whenever default should happen to be made, to appropriate that money to the payment of the principal debt *pro tanto*, and as soon as they made that appropriation it would undoubtedly operate as payment; but down to the time of appropriation their Lordships are unable to see anything which would discharge the principal debtor."

Although in that case the money was not deposited by the debtor, I do not see any difference in principle, if we are satisfied that the securities were delivered as collateral security for each and every portion of the discount authorized. If the paper was still running, it is clear that the bank could hold it until every penny of their debt was satisfied; but why should they not also hold the proceeds of the paper, which was held as collateral security? How could the debtors, of their own mere motion and against the will of the bank, convert that which was intended as security into a payment? It has been suggested that although that could not be done during the currency of the principal debt, it is different now that the whole debt

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BURTON, J.A.

is overdue. I am unable to appreciate the distinction; on the contrary, if the argument is sound that it can be treated as a payment at all, then it follows, I think, logically, that each payment as received should be credited on the debt. I do not comprehend how the maturity of the debt can alter the nature of the receipt; if it was not a payment when received, it cannot become any more a payment because the original debt is due.

This Court had to consider the question of the right of a mortgagor to insist upon the proceeds of a policy of fire insurance held as collateral security by a mortgagee being applied in reduction of the mortgage debt, and was unanimously of opinion that the mortgagee held the insurance money, as he held the policy, as collateral or additional security for the mortgage money, and that he was not obliged to apply it in payment even though some portion of the mortgage money was overdue. But even after the maturity of the mortgage, when I concede that an application might be made to compel an appropriation, it would, in my opinion, be open to the mortgagee to shew that there was another fund, on which he was entitled to rank, and to rank upon that estate for the full amount due before the appropriation.

But I think that in that case the mortgagor could not plead and claim the benefit of the policy moneys as a payment.

I think that the direction of the Divisional Court for the application of the moneys in hand to the payment of this particular portion of the debt was erroneous.

The time had arrived, it is true, when the debtor was entitled to have the money applied, but he had no right to demand that it should be applied in any particular manner; that is the right of the bank. It has been suggested that if the bank's contention be correct they could keep the money unapplied as long as the debtors lived. I do not think anything so unreasonable was thought of, and I am quite clear it could not be listened to in a Court of Justice, but I think that if there is an existing fund on

Judgment.

BURTON, J.A.

which they are entitled to rank, they should have the privilege of doing so before making any appropriation.

To my mind this is simply what we should have called a common law action to recover the amount due on several promissory notes, and in their defence the defendants have claimed that the proceeds of their collateral notes should be treated as payment. That is the fallacy throughout. They have claimed, in other words, themselves to make the appropriation to the notes sued on. They have no such right.

It is true that in one of the paragraphs of their defence, they ask a reference, but it is simply a reference to ascertain the amount received by the bank, about which I imagine there is no dispute, and which could be readily ascertained by an application to the bank; but if, contrary to my firm conviction, there is any dispute upon that point, I see no harm in such a reference if coupled with the condition that the costs of it should be borne by the defendants if they fail to establish that the plaintiffs admission of the amount collected is incorrect.

They have in no portion of their defence claimed that the plaintiffs should make an appropriation of the amount so received; on the contrary, they have proceeded upon the assumption that they had the right to make the appropriation, but, as the facts are now all before us, I see no objection to the defence being amended by claiming that the plaintiffs be compelled to appropriate the moneys on hand, to such portion or portions of the debt as they shall be advised.

On that defence so amended, it would be in our power to make any proper order. If on such appropriation sufficient of the proceeds should be applied to wipe out the sums sought to be recovered in this suit; it should be dismissed and the defendants allowed their costs; if, on the contrary, a portion only is paid, the plaintiffs should recover the difference only with their costs of suit.

As to the costs of this appeal, it would, perhaps, be right to mention them again after the appropriation is made.

Judgment.

OSLER, J.A.

OSLER, J. A.—[after stating the facts on which his judgment proceeded]

The question is whether the defendants are not estopped by the finding of Rose, J., on the trial of the issue, and the judgment of the Court thereon.

The principles of the law of estoppel by judgment, are thus stated in the judgment of De Grey, C. J., in the *Duchess of Kingston's Case*, 2 Sm. L. C., 9th ed., p. 813:

"The judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter directly in question in another Court. * * But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

And in *Barrs* v. *Jackson*, 1 Y. & C. C. C. 585, 2 Sm. L. C., 9th ed., pp. 863, 864, Knight-Bruce, V. C., said: "It is, I think, to be collected that the rule against re-agitating matter adjudicated, is subject generally to this restriction that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those objects are not all necessarily established conclusively between the parties, and that either may again litigate them for any purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object."

Now the question is, what was in issue between these parties on the trial before Rose, J., in April, 1894. It was the trial of an issue directed by the Court for the purpose of enabling them to determine what they should do with the application the defendants had made to them.

Judgment.

OSLER, J.A.

"The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is the decree and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties, and which were alleged between them:" *Robinson* v. *Duleep Singh*, 11 Ch. D. 798, at p. 813. So in *Hobbs* v. *Henning*, 17 C. B. N. S. 791, at p. 827, it is said: "If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings and other matters referred to in the judgment."

Here, therefore, we are obliged to go behind the mere words of the issue and judgment thereon, to ascertain what were the rights in dispute between the parties.

That the plaintiffs had moneys in their hands which would, under some circumstances, be available as a discharge *pro tanto* of the liability of the defendants for advances and discounts was not denied. What was in dispute was on what terms the collateral securities and payments received by the plaintiffs on account of them were held. Whether such payments were immediately applicable so as to be pleadable as payments on the direct liabilities, or whether the plaintiffs were entitled to place the whole to a suspense account as security for the ultimate balance which should be due to them after all other sources of payment had been realized.

That this was the real dispute may be gathered from the order directing the issue and the proceedings therein mentioned, as well as from the terms of the issue itself, viz.: "Whether the bank have received any payments which ought to be applied, etc., and if so, when such payments ought to be applied."

The cardinal matter therefore in dispute on the trial of the issue was as to the terms of the agreement on which the bank held the collaterals and the moneys they had collected thereon, "or," as is said in the judgment delivered

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OSLER, J.A.

by the Court directing the trial of the issue, "which they may collect" thereon, for the bank claim they were all held on the footing of the same agreement.

Rose, J., held, that the terms of the agreement were such as to entitle the bank to place the collections to a suspense account for the purpose above described, and that the defendants were not entitled to set off such payments as had been made against the claim of the bank then in judgment. Now, the plaintiffs are suing for another portion of their direct liability, as I have called it, and again the defendants, this time by their pleadings, assert the right to have the collections made on account of the collaterals applied on the claim. Again the cardinal question is as to the terms on which the bank hold the collaterals, and the collections made on account thereof. No new facts appear beyond these that some further payments on the same account have been received; but it has now been held that the bank were not entitled to carry the collections to a suspense account, or to recover judgment without giving credit for what they have received.

The immediate subject of the decision in each of these proceedings was the same, viz., the nature of the agreement under which the bank held the collaterals. If the judgment in appeal is right then that of Rose, J., and the judgment affirming it, must be erroneous; but the time has passed when the latter can be impeached, and therefore the former cannot stand, as it would directly defeat the earlier decision by withdrawing from its operation that which in the language of Knight-Bruce, V. C., was its immediate subject. The defendants can now neither deny that the agreement was as Rose, J., held it to be, nor assert that it is not applicable to all the collaterals which were deposited under it and held by the bank. I refer to *In re May*, 25 Ch. D. 231; *Concha* v. *Concha*, 11 App. Cas. 181; *Houston* v. *Marquis of Sligo*, 29 Ch. D. 448; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *In re South American and Mexican Co.*, [1895] 1 Ch. 37.

For these reasons I am of opinion that the appeal should

be allowed. I am not, however, to be understood as deciding that at the proper time and on a proper application the plaintiffs may not, if they refuse to do so, be compelled to give credit for all amounts received by them. All I decide is that at the present stage and on this record, the defendants not being prepared to pay off their whole claim, the plaintiffs are entitled, as they were entitled in the former action, to judgment, so that they may be in a position to rank for the face of it upon any dividend sheet which the sheriff may hereafter prepare under the Creditors' Relief Act.

Judgment.

OSLER, J.A.

MACLENNAN, J. A.:—

The question raised in this action is one of great general importance, for there must be many banking accounts secured just in the way in which this one was. I do not think, however, there is any doubt or difficulty about the principles of law upon which it must be decided. All that we have to do is to apply to the facts the principle involved in the agreement of the parties, that the collateral notes in question were in the hands of the bank as security for the account, that is for every part of the debt. It is not disputed by any one that such is the meaning of the agreement. While the business went on smoothly and prosperously, the debtors came to the bank from time to time, received the notes about to fall due, and themselves received payment from their customers, replacing the notes withdrawn from the bank by others. But that was not their right, it was matter of consent by the bank in each case, and the bank could have refused to part with the notes and have insisted on receiving the money themselves. Therefore when the debtors got into difficulty and stopped payment, the customers' notes then in the hands of the bank became and were to them a security for every part of the debt represented by the ten notes under discount and the overdrawn account. The debt amounted to $147,000, while the notes deposited only aggregated about $105,000. If

Judgment.

MACLENNAN, J.A.

all the collaterals were good and certain to be collected the security was still inadequate. There would be a deficiency under the most favourable circumstances of $42,000. Under these circumstances and in the absence of any agreement to the contrary, I think it is perfectly obvious that it was for the bank to decide upon what part of their debt they would apply the money which they might receive from time to time on the collections. They were clearly not obliged to continue to do as they did at first when they credited the $6,921.32 then in their hands upon the first note which matured, but it is equally clear that they had a right to do so. They had a right to sue for that note, and to hold the sum then in their hands to see whether the other notes would be paid. They had the same right when the next four notes successively fell due, and when they sued upon them and recovered judgment and execution, as I understand the facts, all they had in their hands up to November, 1893, was $47,000, and there were still four notes amounting to $50,000 yet to mature in the month of December. When they were called upon to apply the money they collected upon the executions in the sheriff's hands, they had a clear right to say: We do not know whether these other notes will be paid or not, and if not we may prefer to apply the money on them or some of them. Until they become due we shall make no application, and when they do, if not paid, we shall consider in what way it will be most for our interest to apply our security. Therefore I think my brother Rose was quite right in deciding, upon the issue tried by him, that the plaintiffs were not bound to apply the money on the executions, and I think they were entitled to make what they could by these executions under the provisions of the Creditors' Relief Act without crediting the money in their hands.

The application out of which the issue arose was one to compel the plaintiffs to apply the money in their hands upon their judgments and executions, and was made in the beginning of November, before the last four

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MACLENNAN, J.A.

notes became due; and although the order directing the issue was made on the 29th of December, after the notes had all become due, the aim and purpose of the issue was still to compel the plaintiffs to apply the money to the judgments, and I think the finding and the order upon the issue do no more than decide that the plaintiffs could not be compelled to do so. They do not decide, and of course could not decide, that the plaintiffs were not bound to apply the money at some time and in some manner on and towards the satisfaction of their claims against the defendants, but only that they were not bound at or before the 20th of April, 1894, to apply it on the particular judgment debts therein named.

On the 18th of December, 1893, the last of the notes became due, and it is necessary now to consider how that affected the rights of the parties. The whole debt was now due, and the plaintiffs had a certain sum of money in their hands, perhaps at that time $50,000. That sum was a security for their whole debt and for every part of it. By their diligence they had recovered judgments for a large part of it, and a large quantity of goods had been seized. There were other executions in the sheriff's hands besides the plaintiffs; but still the goods seized became and were to an important extent a further security to the plaintiffs for part of their debt. It is evident that it was not for the interest of the plaintiffs to apply the money in their hands to the part of their debt for which they had now got other security. They had the undoubted right so to apply it, but they were not obliged to do so. So, too, when the debtors made an assignment of certain assets for the general benefit of their creditors, this also became a further security for what it might be worth to the plaintiffs. But as this security was equally applicable to the whole debt, it would seem not to affect the question of the application of the money on hand, except to the extent to which it was applied before proof of claim.

What, then, were the rights of the parties with respect

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MACLENNAN, J.A.

to this money when this action was commenced? I am unable to agree with the view taken either by my brother Rose or by the Divisional Court. The former decided on the issue tried before him that the plaintiffs were not compelled to apply the money on their executions. But when the remaining notes became due the situation was changed and the question was not the same on the trial of the present action. The time had arrived for application in some way, and I do not see how the the question in the present action could be regarded as *res judicata*. So also I think the Divisional Court were wrong in deciding that because the plaintiffs had refused to apply the money to the executions they must submit to apply it to the notes sued on in this action. The plaintiffs did not refuse to apply in that sense. The application to compel them was premature, being made before the last four notes matured. They resisted that application, and resisted rightly and successfully. But just as they were not compellable to apply the money on the executions, so they are not compellable to apply it on the present notes, as the Divisional Court has determined. Their right is to elect on what part or parts of their debt they will apply it, and that also is their obligation.

Considerable stress was laid in the argument before us upon the fact that the customers' notes were "collateral" security, and, therefore, a sort of secondary security, which the bank could hold in reserve until they had exhausted all their remedies on the principal notes by judgment, execution, or otherwise. I do not think the word has any such meaning. It means no more than additional, and implies no different, or greater, or inferior right of the creditor in respect thereof than he possesses in respect of what may be called the principal security.

That this is so is now settled by the Court of Appeal in *In re Athill, Athill* v. *Athill*, 16 Ch. D. 211, at pp. 218, 220, where in the administration of the assets of a debtor a debt was held to be borne proportionally by the persons entitled to the principal security and what was called a collateral

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MACLENNAN, J.A.

security held by the creditor. The notes in question here were, therefore, in my opinion, just simply security and nothing more. The debtor's notes were not security at all. They represented the debt which was secured. The collateral notes were the debtor's property in the bank's hands, and were redeemable, and when the bank made collections the money they received was the defendants' money in their hands just as the notes had been. The bank were mortgagees. They held the money as security for the defendants' account. The meaning of that was that if the defendants did not pay, then this money could be applied in payment. The default had now occurred, the whole debt was due. The plaintiffs had a right to apply the money towards payment, and the debtors had a corresponding right to have it so applied. That was the very purpose for which the fund was provided. Nothing can be clearer than that a mortgagee after his debt is due is bound at once to apply any money then in his hands realized from his securities in reduction *pro tanto* of his debt. So here, the whole debt having fallen due on the 18th of December, 1893, it was the duty of the plaintiffs to apply the money then in their hands. Their debt, however, was about $140,000, and the money in their hands something over one-half; their debt was composed of several parts, a number of judgments with executions, and a number of promissory notes, just become due, and an over-drawn account. They could choose how they would apply the money, but some application of it the debtors were entitled to. They made no application of it, and on the 2nd of June, 1894, they commenced the present action for notes amounting to $50,000. The defendants have pleaded all the facts, and ask to have an account of the money collected on the collateral security and to have it applied on the debt. As already stated, it was admitted at the trial that the plaintiffs had then in their hands $82,135, besides what had been credited in the first judgment, derived from the collateral security. They simply joined issue on the defence and made no offer to apply the money in their hands. I think

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MACLENNAN, J.A.

the action ought not to have been dismissed. It is a mortgagee suing for his debt, admitting that he has a large sum in his hands derived from his security. The whole debt is due and the time has arrived for taking the mortgage account and ascertaining what is due after applying the money in the plaintiffs' hands.

That is what ought to have been done, and that is what should be done now. The plaintiffs must decide how they will apply the money in their hands, their right being to apply it in the way most beneficial to themselves. If the parties cannot agree there may be a reference. If in the result the notes now sued upon or any part thereof be not paid, the plaintiffs should have judgment therefor with costs, otherwise the action should be dismissed with costs. In any case there should be no costs of the appeal.

It was contended by Mr. Shepley, for the plaintiffs, that they were entitled to hold the money in hand unapplied in a suspense account until they had exhausted all their legal remedies by judgment and execution or otherwise against the property of the debtors. No authority was cited to us for that proposition, and I know of none, nor of any principle of law to support it. If it were well founded the plaintiffs could keep the money unapplied as long as their debtors or any of them lived, in hopes of realizing something under these executions. I think such a dealing with securities could only be warranted by a clear and express agreement. I have not found any evidence of such a dealing. On the other hand the following cases are very significant, treating it as they do as a matter of course that the creditor must apply money realized from his securities in reduction of his debt when it has become due: *Kellock's Case*, L. R. 3 Ch. 769, a judgment of the Master of Rolls, affirmed by the Court of Appeal; *Benning* v. *Thibaudeau*, 20 S. C. R. 110; *Eastman* v. *Bank of Montreal*, 10 O. R. 79. See also *Edmonds* v. *Hamilton Provident and Loan Society*, 18 A. R. 347.

I ought, perhaps, to guard against a misapprehension of my meaning, in saying that the plaintiffs had a right to

refuse to make application of the money in their hands until their whole debt became due. That statement is too general. Their strict right, as I understand it, is to hold in reserve, without application, a part of the money on hand equal to the part of the debt still to mature; all in excess of that they ought to apply from time to time without waiting for the maturity of the whole debt. Judgment. MACLENNAN, J.A.

Appeal allowed, MACLENNAN, J.A., *dissenting*.

TRUST AND LOAN COMPANY V. MCKENZIE.

Mortgage—Owner of Equity of Redemption—Extension of Time for Payment—Increase in Rate of Interest—Reservation of Remedies.

An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected or the value of the mortgaged property impaired he cannot complain.

Bristol and West of England Land Co. v. *Taylor*, 24 O. R. 286, distinguished.

Judgment of ROBERTSON, J., reversed, OSLER, J.A., expressing no opinion.

THIS was an appeal by the plaintiffs from the judgment of ROBERTSON, J. Statement.

The action was brought against the defendant upon his covenant in a mortgage made by him in favour of the plaintiffs, and the defence was that he had been discharged because of an agreement for an extension of time for payment of the mortgage debt, entered into, under the circumstances stated in the judgment, between the plaintiffs and a subsequent purchaser of the mortgaged land. The action was argued on a special case before ROBERTSON, J., who, on the 8th of June, 1895, gave judgment in favour of the defendant as follows:—

The defendant McKenzie relies on the case of *Bristol and West of England Land Co.* v. *Taylor*, 24 O.R. 286, in

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which the Queen's Bench Division reversed a decision of my own in a case almost in express terms with the one set out in this special case, on the ground that the reservation of rights on the part of the creditor as against the surety is not effectual to avoid the consequences of any other alteration in the terms of the contract than an extension of the time for payment. In that case, as in this, there was not only an agreement to extend the time for payment of the principal money, but there was an agreement on the part of the principal debtor with the creditor to pay an increased rate of interest during the extension; and the Divisional Court held that the words "reserving the creditor's rights against the surety," however effectual they may be in so far as the extension of time is concerned, are mere "idle words" in so far as any effect upon the stipulation for an increased rate of interest is concerned, and that the surety was therefore discharged. By this decision I am bound, but I have reconsidered the point, and I have consulted many authorities, not only those referred to by me in my judgment in that case, but others, and with the result that, in my judgment, the agreement to pay an increased rate of interest, in addition to the extension of time, cannot make any difference. The reservation of rights on the part of the creditor, in my judgment, enables the surety to say to the debtor: "I am not a party to that agreement, and as I am surety for the due and proper payment of the principal money, as well as the interest, as provided by the original mortgage, I do not feel at liberty to allow you to avail yourself of that agreement; I will, therefore, take a reassignment of the mortgage, and enforce my rights against you on it."

This I, with great respect for the opinion of my learned brothers who constituted the Court giving judgment, think is the effect of a reservation of rights such as was agreed to by and between these plaintiffs and the principal debtor, and in that case the plaintiffs would be entitled, in my

judgment to recover against the surety; but the Divisional Court has come to a different conclusion, and that makes it incompetent for me, sitting as a Judge of the High Court, in Single Court, to depart from or disregard that decision. Nor do I think that section 9, sub-section 2, of 58 Vict. ch. 15 (O.), somewhat inaptly entitled "An Act for diminishing appeals," authorizes me, as suggested by counsel for plaintiffs, to refer this special case to the Court of Appeal, although I do think the question is of sufficient importance to be considered by the higher Court. This, of course, does not prevent the plaintiffs from appealing in the ordinary way.

Judgment.

ROBERTSON, J.

There will, therefore, be judgment for the defendant McKenzie, with costs; and judgment of foreclosure for the plaintiffs in the usual way.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 11th of November, 1895.

Marsh, Q. C., for the appellants.

J. N. Fish, for the respondent.

The following cases were cited: *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286; *Canadian Bank of Commerce* v. *Northwood*, 14 O. R. 207; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Rucker* v. *Robinson*, 38 Mo. 156; *Morgan* v. *Smith*, 70 N. Y. 537; *Whitcher* v. *Hall*, 5 B. & C. 269; *Pickles* v. *Thornton*, 33 L. T. N. S. 658; *Philips* v. *Astling*, 2 Taunt. 206; *General Steam Navigation Co.* v. *Rolt*, 6 C. B. N. S. 550; *Sanderson* v. *Aston*, L. R. 8 Exch. 73.

January 14th, 1896. MACLENNAN, J. A.:—

The learned Judge proceeded on the authority of *Bristol and West of England Land Co.* v. *Taylor*, 24 O. R. 286, by which he considered he was bound. But for that

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MACLENNAN, J.A.

case he would have decided differently and have given judgment for the plaintiffs. I do not think that case like the present, for that was a common case of principal and surety. The mortgagee Taylor assigned his mortgage to the plaintiffs, and in the assignment covenanted with them to pay it in case of default by the mortgagor. After that without the surety's consent the plaintiffs agreed with the debtor for an extension of time and an increased rate of interest, and it was held that the surety was thereby discharged. Here it is the original debtor, the mortgagor, who has been discharged, a very different thing. In that case the original contract between the creditor and the principal debtor was held to have been altered, whereas here there is no pretence that the original contract has been in any way changed. The theory of the judgment is that by the sale of the land subject to the mortgage the purchaser has become a principal debtor and the mortgagor a mere surety, and that an extension of time to the purchaser discharges the original debtor. There is no doubt that when mortgaged land is sold by a mortgagor subject to a mortgage a sort of suretyship results, but it is altogether between the mortgagor and his vendee. The vendee is the person who as between them ought to pay, the debt is now his debt, and the mortgagor is his surety. But the mortgagee's position has not been changed. The mortgagor is the only debtor, and the land alone is still his only security. The expression "principal debtor" used in cases of suretyship imports that there is another debtor, namely, the surety.

The present case is therefore not a case of suretyship at all within the decisions as to discharge of surety by dealings without his consent between the creditor and principal debtor. It is really only a case of indemnity. McKenzie, the mortgagor, sold the property to Franklin, subject to the mortgage and took a covenant from him to pay it. Franklin did not, by that purchase, become a debtor to the plaintiffs, and so did not become a surety for McKenzie; he simply became bound to indemnify

McKenzie, and to relieve him from paying the mortgage by paying it himself. That covenant of Franklin's still remains in full force, and has never been interfered with in any way by the plaintiffs. Then Franklin sold to Isabella McLaughlin, subject to the mortgage. It is not said that she covenanted to pay it, so that her liability to do so was an implied and not an express liability; and Mrs. McLaughlin no more than Franklin did not become a debtor to the plaintiffs.

The next transaction was on the 1st of November, 1887, the day on which the mortgage fell due. At that time Mrs. McLaughlin was the owner of the equity of redemption under her conveyance from Franklin. On that day an agreement was made between the plaintiffs and James F. McLaughlin, the husband, which erroneously recited that he was the owner of the land, and provided for an extension of time for payment for three years, on certain terms. It is not necessary to refer further to this agreement, for as the land belonged to the wife at that time and not to the husband, the latter was a mere stranger to McKenzie and also to the land, and it could not be pretended that any agreement with a stranger could in any way affect or impair the mortgagor's covenant to pay the mortgage debt.

It was not until the 5th July, 1890, that James F. McLaughlin acquired the land, having bought it under a power of sale in a second mortgage which had been given by his wife. On the same day he sold to the defendant Treblecock, subject to the mortgage, and Treblecock gave him a covenant to pay the mortgage off. After that and on the 31st October, 1890, occurred the transaction which the defendant McKenzie relies upon as having discharged him from his covenant to pay the mortgage debt. It is an indenture between Treblecock and the plaintiffs, reciting the mortgage, and that there is $1,500 due thereon for principal money. It then proceeds as follows:—

"And whereas the said party of the first part is now the owner of the equity of redemption of said lands and

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MACLENNAN, J.A.

seized thereof in fee simple in his own right, and has assumed payment of the said mortgage debt and doth agree with the said company to pay off the same, and without prejudice to the company's right under said mortgage to take immediate possession upon default or otherwise without notice, and without prejudice to the right of subsequent incumbrancers to take possession, doth hereby attorn to the said company and become their tenant of the said lands from year to year, at a rental payable at the same times as, equivalent to, and applicable in satisfaction of the interest hereby secured, it being agreed that neither the existence of this clause nor anything done by virtue thereof shall render the company mortgagees in possession or accountable for any moneys except those actually received by virtue thereof. Now, therefore, in consideration of the premises and the mutual agreement herein made, it is hereby agreed by and between the said parties hereto that the payment of the said principal sum of $1,500 shall be extended for two years from the 1st day of November, A.D. 1890, and that the said principal sum shall bear interest both before and after maturity at the rate of six and one-half per centum per annum dating from the 1st day of November, 1890, and payable on the days in the said mortgage mentioned, until the same shall be fully paid, and time shall be strictly of the essence of this agreement.

"And this agreement shall from the date hereof, and without prejudice to the present state of the mortgage account, be read and construed along with the said mortgage and treated as a part thereof, and for such purpose the said mortgage shall be regarded as being hereby amended, and the said mortgage together with all the covenants and provisoes thereof as so amended shall be and continue to be in full force, virtue and effect.

"And it is further agreed that nothing herein contained shall in any way affect the right of the said company as against any surety for the said mortgage debt or any part thereof, or prevent the said company from taking any proceedings at any time for the purpose of realizing upon

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MACLENNAN, J.A.

their said mortgage security or any part thereof, either as against any person or the property or estate of any person who is not a party to this instrument."

Now this is an agreement made for the first time with a person who was under no previous liability to the plaintiffs, and a person between whom and the defendant McKenzie there was no privity of contract. There was privity, but it was mere privity of estate. McKenzie could not call upon him to pay the debt, and if he paid it himself he could not recover it from him. His only right was that if he, McKenzie, paid the plaintiffs he could enforce the mortgage against him by foreclosure or sale. That being the case, I see no reason and I know of no law which could prevent the plaintiffs from making any bargain they pleased with Treblecock for payment of their mortgage debt, so long as it did not interfere with the mortgagor's right to redeem the land. Why could Treblecock not say to the plaintiffs: This encumbrance on my land is now due; you cannot make me pay it; I am not your debtor, although it is true you can foreclose and deprive me of the land if I do not; but I am willing to become your debtor, to bind myself to pay it on certain terms. If you wait for the principal money for two years, I will agree to pay it at the end of that time, and I will pay you interest in the meantime at an increased rate. Why should the company not agree to that? And how could such an agreement affect the mortgagor? It could not affect him at all if Treblecock were a stranger to the land. But being the owner of the land, such an agreement, without some stipulation to the contrary, would give Treblecock a right against the plaintiffs and all the world to be free from foreclosure proceedings until the extinction of the extended time for payment. Therefore if McKenzie being sued on his covenant and being compelled to pay, and having obtained a reconveyance or assignment of the mortgage, according to his undoubted rights, sought to obtain repayment by suit against the mortgaged lands, he would be met by the agreement for an extension of time

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made between the plaintiffs and Treblecock. By agreement between the mortgagees and the owner, the land has been tied up for two years, and the mortgagor's right to resort to the land for indemnity has been destroyed. His right was a right to immediate indemnity, and that right is now gone by the act of the mortgagee. The mortgagee has, therefore, by his agreement with the present owner, made his mortgage unredeemable by the mortgagor according to the terms, and the effect of that must be to discharge the mortgagor from liability altogether. The mortgagor's liability on his covenant and his right to have the mortgage estate restored to him upon payment are reciprocal, and if the mortgagee cannot restore the estate in its integrity save so far as any impairment was warranted by the terms of the mortgage itself, such as a sale of part of the land under a power, etc., then he cannot enforce the debtor's covenant, his liability is gone: *Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, 27 Beav. 349; S. C. 28 Beav. 341; *Rudge* v. *Richens*, L. R. 8 C. P. 358; *Walker* v. *Jones*, L. R. 1 P. C. 50; S. C. 3 Moo. P. C. N. S. 397; Fisher's Law of Mortgage, 4th ed., p. 962; Coote's Law of Mortgage, 5th ed., p. 792.

But what if the bargain between the mortgagee and the owner of the equity of redemption makes express provision for the original mortgagor's rights, and instead of destroying or impairing them guards them? Why might they not stipulate that if the mortgagor paid or was compelled to pay the debt before the time agreed upon, the agreement should not stand in the way of his indemnity? There can be no reason why they might not, and I think the sole question in this case is whether the agreement made between the plaintiffs and Treblecock above set forth does or does not sufficiently preserve and guard the mortgagor's rights in case of his paying the debt. In the first place the land is still in the hands of the mortgagees in its integrity, and can be reconveyed. The amount the mortgagor has to pay has in no way been increased. The fact that Treblecock has agreed to pay interest after maturity at a

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higher than the ordinary legal rate does not concern the mortgagor in any way, for all he can be compelled to pay is what the law allows, and no more, the mortgage itself making no provision whatever for interest after maturity: *St. John* v. *Rykert*, 10 S. C. R. 278.

The only thing that affects the mortgagor's rights is the extension of time, for the agreement extends it for two years from the 1st November, 1890, the money having become payable by the terms of the mortgage on the 1st November, 1887. Now I think the words used in the last clause of the agreement as above set forth are amply sufficient to preserve the company's rights and the reciprocal rights of the mortgagor. When it was made the company had an undoubted right to sue the mortgagor on his covenant, and the latter could have made no defence. Suppose they had sued him immediately after the agreement, and he had set its provisions up as a defence, he would be met by that clause which declares that nothing therein contained shall prevent the company from taking proceedings at any time either against any person or the property or estate of any person not a party to the instrument. In order that it shall not hinder the company's proceeding against the mortgagor, it must equally not hinder or prevent the mortgagor's right to proceed against the land, and such in my judgment is its effect. The same reasoning by which in cases of actual suretyship a reservation of remedies has been held sufficient is equally applicable here, and prevents this extension of the time for redemption of the land by the owner of the equity of redemption from releasing the mortgagor: *Rees* v. *Berrington*, 2 W. & T. L. C., 6th ed., pp. 1130, 1131; DeColyar's Law of Guarantees, 2nd ed., p. 366.

That the agreement is not to prevent the company from taking proceedings against other persons can have no sense unless it means taking proceedings effectually, and that it may not be used as a ground of defence to such proceedings.

But even if McKenzie could be regarded as a surety

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before and at the time Treblecock entered into this agreement, I should have been of opinion that the reservation of remedies was sufficient and effectual to prevent the discharge of the mortgagor. I have already pointed out that the mortgage contains no covenant for payment of interest after maturity, and therefore his agreeing to pay interest at a certain rate after maturity was no alteration of the terms of the mortgage, but was the consideration which Treblecock agreed to give for the extension of time for the payment of the debt. That it was called interest is immaterial; it was so much money of his own, not any part of the mortgage money, which he agreed to pay for forbearance.

I am, therefore, clearly of opinion that the mortgagor has not been discharged from liability on his covenant, and that the appeal should be allowed, and that there should be judgment for the plaintiffs.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

OSLER, J. A.:—

I had prepared a judgment dealing with the case as presented in the special case and on the argument, but as the decision appears to me to proceed on other grounds, I think it better to say that I take no part in it.

Appeal allowed.

IN THE MATTER OF THE DAM AND SLIDE ON THE LITTLE BOB RIVER.

Water and Watercourses—Rivers and Streams Act—Mills and Mill Dams Act—R. S. O. ch. 118—R. S. O. ch. 120, sec. 20.

It is only when improvements in a stream are made for the express purpose of facilitating the floating of saw logs, lumber and and timber, that tolls can be charged for their use under the Rivers and Streams Act.
A mill-dam is not such an improvement, and the right of the lumberman, conferred by R. S. O. ch. 118, to float saw logs, lumber and timber over it is unaffected by that Act.
Judgment of DEAN, Co. J., affirmed.

Statement.

THIS was an appeal by Mossom Boyd & Co. from the judgment of His Honour Judge Dean dismissing an application made by them under section 13 of R. S. O. ch. 120, "An Act for protecting the public interest in rivers, streams and creeks," to fix the tolls chargeable by them for the use of constructions and improvements made by them for the purpose of floating saw logs and timber down the Little Bob River.

The appeal was argued before OSLER, J. A., on the 23rd of November, 1895.

H. J. Wickham, and *C. W. Thompson*, for the appellants.
Cassels, Q. C., and *T. Stewart*, for the respondents.
Irving, Q. C., for the Attorney-General of Ontario.

February 12th, 1896. OSLER, J. A.:—

The construction and improvements in question consist, first, of a mill dam on the river, and second, the removal of certain stones or obstructions in the channel, whereby the passage of saw logs and timber is rendered easier and more convenient. The Little Bob river or channel is the south branch of a stream which connects Pigeon and Sturgeon lakes. The land on both sides, except a reservation of one chain in width on each bank, was purchased by the appellants from the Province soon after Confederation. The reservation, as well as the chan-

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nel of the stream, which was not a navigable one, was the property of the Crown as represented by the Dominion Government. It is not necessary to enter into any detail as to the Crown's title further than to say that in connection with the canal and works on the north branch or Big Bob channel, the reservation and stream in question were part of certain river and lake improvements, the property of the Federal Government under schedule 3, No. 5, of the B. N. A. Act.

For many years prior to 1868 the appellants, or their immediate predecessors in title, had been operating a mill on the north branch of the river, drawing the water from the canal in that branch, and thereby occasionally interfering with the navigation. Negotiations appear to have taken place on the subject between them and the Government, set forth very fully in the report, dated 3rd of March, 1868, of Mr. Thomas Monro, Government Engineer, the result of which was that in the year 1874 the Dominion Government issued a patent to Mr. M. Boyd for the chain reserve on each side of Little Bob. The patent recited that the channel and reservation, by reason of the same being lands and water power connected with that public work of Canada known as the Bobcaygeon Canal, were by the B. N. A. Act, 1867, the property of the Federal Government. The patent also recited that Boyd had built a saw mill at the foot of the channel (*i.e.*, the Little Bob), driven by the waters thereof by means of a dam built across the same by "our permission," and the grant was to the said M. Boyd in fee of "all and singular those portions of the lots in question heretofore reserved to us, and comprising a strip of land extending across the said lots one chain in width, extending from and along both sides of the Little Bob channel, together with the right to dam up the said channel and take therefrom sufficient water to drive his said saw mill."

The mill referred to in the patent was erected in lieu of that which had formerly been operated on the Big Bob, and the dam, which is the one in question in this

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application, was built by the appellants for the purpose of the new mill. This had been done under the authority of certain Orders in Council some time between the date of Monro's report and the issue of the patent.

The only other facts necessary to be noticed are: (1) that the channel of the Little Bob was not conveyed by the Federal Government to the appellants, but only the right to dam it and to take therefrom sufficient water to drive the mill; (2) that the Government still retain rights in the channel and the water therein, which they may exercise whenever it becomes necessary to divert it for the purpose of the navigation of the Big Bob; and (3) that the Little Bob as far back, at all events, as the year 1831 has been a stream "down which lumber had been usually brought." Whether this could have been done while the stream was in a state of nature, or whether its capacity was owing to the erection of some kind of dam or other improvement thereon in the year 1835 or thereabouts, seems to me unimportant. It was a stream of the character I have mentioned long before the erection by the appellants of their mill dam. It is referred to in Monro's report as "the saw log channel," and its improvement as such by the appellants' works is evidently contemplated as one of the results, if not one of the immediate objects, of such works. It is hardly necessary to say that by means of the appellants' works the passage of saw logs and timber through the channel has been very greatly facilitated, and that the appellants, whose logs and timber are of course not required to pass over the dam, sustain very considerable inconvenience and expense, in separating their own property from that of other lumbermen who use the channel both above and below it.

The question raised by the appellants in these proceedings, therefore, is whether they come within the provisions of the Act R.S.O. ch. 120, which are taken from 47 Vict. ch. 17 (O.), an Act passed, I believe, in consequence of the litigation in the well known case of *Caldwell* v. *McLaren*, 6 A. R. 456, 9 App. Cas. 392, which established the right of the public to

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float timber and logs down streams during the season of freshets, even if such streams were rendered floatable only by means of improvements made by the owners of the bed of the stream, and to use such improvements without compensation.

The appellants contend that their mill dam is an improvement within the meaning of the Act, for the use of which by others they are entitled to payment of reasonable tolls, the amount of which they have requested the County Judge to fix under section 13. Their application was opposed in the interest of other lumbermen, and the learned County Judge in an able judgment has decided adversely to their contention. The opposition was based on two grounds: (1) That the Little Bob, not being a navigable stream, and the channel being the property of the Dominion Government and part of the property and public works of Canada, was not within the legislative authority of the Province or subject to the provisions of the Rivers and Streams Act; and (2) that even if it was, the improvement in question was one which by the 20th section of the Act was excluded from its operation as coming within the 3rd and 4th sections of the Act respecting mills and mill dams, R. S. O. ch. 118.

I do not find it necessary to consider the first objection, and I may say here that the only substantial improvement which is in question seems to me to be the dam, and, therefore, that it is not necessary to enter upon the consideration of the comparatively trifling claim connected with the removal of obstructions in the channel. I do not, as at present advised, see that any improvement caused thereby was of so substantial a character as to be the foundation of a claim to fix a toll for the use of the improved channel.

The 1st section of the Rivers and Streams Act enacts that all persons are entitled during the spring, summer and autumn freshets to float and transmit saw logs and timber down all rivers, creeks and streams, and persons requiring so to float and transmit saw logs and timber may construct such apron, dam, slide, etc., or other work neces-

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sary for that purpose, doing no unnecessary damage to the stream or its banks. The 11th section, which was the 2nd section of 47 Vict. ch. 17 (O.), enacts that in case any person constructs in or upon such river, creek or stream any apron, dam, slide, gate, etc., or other work necessary to facilitate the floating or transportation of saw logs or other timber down such river, creek or stream, which was not navigable or floatable before such improvements were made, or shall blast rocks or remove shoals or other impediments or otherwise improve the floatability of the river, creek or stream, such person shall not have the exclusive right to the use of the river, etc., or to the construction or improvements, but all persons during the seasons aforesaid may float or transmit saw logs, etc., down the said streams, etc., and through and over the constructions and improvements, doing no unnecessary damage, subject to the payment to the person who made the constructions and improvements of reasonable tolls.

Section 13 enables the County Court Judge or stipendiary magistrate to fix the tolls, taking into consideration the original cost, the amount required to maintain the construction and improvements and to cover interest upon the original cost, as well as such other matters as under all the circumstances may seem just and equitable.

Section 15 and other sections provide for an appeal from the decision of the Judge.

Section 20 (sec. 20 of the original Act), enacts that nothing in the Act shall be construed as interfering with the powers or rights of any company formed under R. S. O. ch. 160 for the construction of works to facilitate the transmission of timber down rivers and streams, or with mill-dams, or the right to erect and maintain mill-dams or streams; "and the Act respecting mills and mill-dams and any other law conferring rights in mill-dams shall remain the same as if this Act had not been passed."

This section appears to me to give the keynote to the policy of the Legislature, namely, that persons who should make improvements necessary to facilitate the

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floating and transmission of saw logs, that is to say, for that purpose, should be entitled to tolls for such improvements. Companies formed for that purpose and whose charters gave them all the rights they required were not interfered with, and the makers of works and improvements primarily intended to serve other purposes, but which were by law required to be so constructed as not to interfere with the passage of logs, were not within the scope of the Act. This is what, in my opinion, is pointed at by the last clause of the section: "The Act respecting mills and mill-dams and any other law conferring rights in mill-dams shall remain the same as if this Act had not been passed." Turning to that Act, R. S. O. ch. 118, we see that by the 3rd and 4th sections it is enacted that in case a mill dam is legally erected on any stream, down which lumber is usually brought, the owner or occupier of the dam shall construct and maintain a good and sufficient apron or slide of the size and character prescribed, so as to afford depth of water sufficient to admit of the passage over it of such saw logs, lumber and timber as are usually floated down such stream. The right to float saw logs, lumber and timber over the mill dam through or over such apron or slide is plainly a right in the mill dam possessed by the lumberman or other person requiring his saw logs, lumber and timber to be so floated or transmitted, as section 4 of the Act shews, and that right remains the same as if the Rivers and Streams Act had not been passed. It was a right which might be exercised without payment of toll, and in my opinion the latter Act neither imposes any liability to pay tolls nor confers any right upon the mill dam owner to have them fixed by the County Judge, who has here made some just observations as to the difficulty of fixing a toll in a case like the present, having regard to the elements required by the Act to be taken into consideration in doing so.

The dam in question being a mill dam built by the appellants for the purpose of their mill and not intended, except as incident to that, to facilitate the floating or transportation of saw logs, lumber and timber, I think the effect of the

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20th section of the Rivers and Streams Act is to exclude them from its operation and to leave them simply in the position and subject to the burdens of the mill dam owner under R. S. O. ch. 118, the stream being one of the character mentioned in the 20th section of that Act. It may, indeed, be, as was contended, that the stream or channel is one not subject to the provincial legislation. I express no opinion either in favour of or against that contention, as it calls for no final decision at this stage. But if it be not so subject, that is equally fatal to the claim of the appellants to have tolls fixed under the Act, whatever their legal rights in other respects may be.

I therefore agree with the decision of His Honour Judge Dean, and dismiss the appeal. This being the first application, so far as I am aware, under the Act, and the respondents having obtained thereby a legal decision as to their right to use the appellants' improvements without charge, I abstain from exercising any jurisdiction I may possess over the costs of the appeal.

Appeal dismissed.

HAMILTON PROVIDENT AND LOAN SOCIETY v. STEINHOFF.

Partnership—Covenant in Firm Name.

Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to a mortgage in favour of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgage, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgage :—

Held, affirming the judgment of ROSE, J., that this covenant bound only the partner who signed it.

Statement. THIS was an appeal by the plaintiffs from the judgment of ROSE, J.

The defendant carried on a banking business in partnership with one Lillie, and the action was brought against him to recover the amount of a mortgage made by one H. W. Clark to the plaintiff, under a covenant under seal for payment of the mortgage debt signed in the firm name by Lillie. The facts are more fully stated in the judgments.

The action was tried at Hamilton on the 14th day of November, 1894, before ROSE, J., who, on the 15th of August, 1895, gave the following judgment in favour of the defendant :—

ROSE, J. :—

Owing to delay in forwarding the papers, for which I understand the local registrar is not responsible, the giving of judgment herein has not been practicable until now.

I found at the trial, and remain of the opinion, that there was no contract, express or implied, between the defendants and H. W. Clark by the terms of which the defendants were to pay the mortgage to the plaintiff company. The defendants received the conveyance of the equity of redemption as collateral security only, and were not, in my opinion, bound to protect Clark or the lands against the mortgage debt. Recently I had the reporter read to me the notes taken at the trial and the argument of counsel, and upon the best consideration I have been able

to give I am of the opinion that the defendant Steinhoff cannot be held to have authorized his partner, either expressly or impliedly, to assume the liability of Clark to the plaintiff company. Certainly there was no express authority, and I am of the opinion that to imply authority from the course of dealing I should have to see that the business had been carried on by Lillie in such a way, to the knowledge of Steinhoff, as would make it appear to Steinhoff that such an agreement might probably be entered into by Lillie.

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Rose, J.

The plaintiff's counsel relied upon *Weikersheim's Case* L. R. 8 Ch. 831, and derived some comfort from it, as also from the text of Lord Justice Lindley's book on partnership, 5th ed., p. 141. But that case has been considered and explained in *Niemann* v. *Niemann*, 43 Ch. D. 198, by the Court of Appeal, and the result is stated in the headnote as follows: "There is no power in one partner, in the absence of special authority from his co-partners or evidence of a special course of dealing, to accept shares in a company even though fully paid up in satisfaction of a debt due to the firm."

Lord Justice Cotton stated the effect of what was proposed to be done was "sanctioning the defendant to enter on behalf of himself and his partner into a speculation, in order if possible with others to work out the estate of a debtor of the firm in such a way as to produce a profitable result." This he held was not permissible.

One should, I think, hesitate before coming to the conclusion that a partner in a banking firm has the right to bind his partner—without his knowledge or assent—to pay a large mortgage debt in order to realize, if possible, an asset composed of an equity of redemption of small or doubtful value. The speculation might produce a profitable result or might end in disaster. In the absence of authority, I cannot so hold, and, as it seems to me, the decision in *Niemann* v. *Niemann*, 43 Ch. D. 198, is to the contrary.

The action must be dismissed with costs as against the defendant Steinhoff.

Argument. The plaintiffs appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd of February, 1896.

Osler, Q.C., and *Crerar*, Q.C., for the appellants. *Niemann* v. *Niemann*, 43 Ch. D. 198, relied on below is not applicable. There there had been a dissolution and an agreement to leave the winding-up of the business to one partner who it was held was not bound to take his share in the new stock. That case stands by itself and does not interfere with the principle stated in *Weikersheim's Case*, L. R. 8 Ch. 831. But even if *Niemann* v. *Niemann*, does apply, the appellants bring themselves within it. The course of dealing is clearly shewn, and there was authority to bind the firm. This was simply a guarantee, and the seal may be disregarded. It was not necessary to prove an authority under seal to execute the document. Lillie's implied authority was quite enough, and Steinhoff is bound: *Const* v. *Harris*, T. & R. 496, at p. 523; *Sandilands* v. *Marsh*, 2 B. & Ad. 673; *Paterson* v. *Maughan*, 39 U. C. R. 371.

Watson, Q.C., for the respondent. This is a simple question of fact. To give a guarantee of the debt of a third person is outside the scope of a partner's implied authority and the onus of proving authority in fact has not been discharged. At most the covenant binds only the partner signing it.

Osler, Q.C., in reply.

March 10th, 1896. HAGARTY, C. J. O.:—

As the case comes before us there seems to be no evidence whatever that the defendant had any notice or knowledge of his active partner Lillie's action in entering into a covenant in the partnership name to pay the mortgage debt.

That a firm of bankers might take a mortgage to secure or to be collateral to a debt incurred in their legitimate business is not the question for us, and it is not necessary to

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decide whether one partner may take such a course without the express consent of his partner.

A very different question is presented here. We find an express covenant in the name of the firm for the payment of the principal money and interest. This seems to me to be wholly without the ordinary power of a partner; not sanctioned either by knowledge, course of dealing or articles of partnership. I have examined the authorities referred to and find all pointing us the same direction.

Our learned brother Rose points out the fallacy of supposing that *Weikersheim's Case*, L. R. 8 Ch. 831, supports the plaintiff's view.

Niemann v. *Niemann*, 43 Ch. D. 198, clearly explains the preceding case, and the necessity of modifying the statement in Lindley's Law of Partnership, 5th ed., p. 141, and I think very distinctly settles the rule of law.

If we uphold the plaintiffs' claim I think we thereby establish a most dangerous precedent in the law of partnership.

It may be well conceded that a partner may take for his firm a second mortgage as a security for a debt to the firm, but to also enter into an engagement to pay off the first encumbrance seems an addition to his co-partner's liability hardly contemplated or warranted by the partnership contract.

BURTON, J. A.:—

The defendant in 1880 entered into partnership for the purpose of carrying on a general banking, discounting and exchange business.

Lillie was to take upon himself the management of the business and Steinhoff was not to be obliged to devote any of his time to it, and in point of fact the business was carried on by Lillie, and Steinhoff was a sleeping partner taking no part in it.

The partnership in the course of its business accepted mortgages from their customers as collateral security for

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BURTON, J.A.

debts contracted by them, which they sometimes assigned to others with a guarantee of payment given in the name of the firm, and occasionally they accepted conveyances from their debtors of their equity of redemption in properties already under mortgage.

The litigation in this case arises out of a transaction of this description.

One Clark had given a mortgage to the plaintiffs upon certain property the equity of redemption in which was conveyed to the defendants.

The plaintiffs in the sixth paragraph of their statement of claim assume that in accepting the conveyance of that equity the defendants became liable to the plaintiffs for the payment of their mortgage which it is needless to say is not the case whatever liability might be incurred as between Clark and themselves.

The mortgage, however, became in default and Lillie on behalf of the firm applied to the plaintiffs for an extension, which was granted upon an agreement, purporting to be made by the firm, in which they covenanted to pay the principal and interest secured by the mortgage.

This was executed by Lillie in the firm's name and on their behalf without the knowledge of Steinhoff, as it must be assumed on the evidence before us, and the question is whether this was within the scope of Lillie's authority.

There is nothing in the articles of partnership expressly prohibiting such a guarantee, for the only paragraph dealing with such matters was evidently intended to prohibit only the making or indorsing accommodation paper outside of the business or becoming security for other persons.

I quite agree with Mr. Crerar's argument that notwithstanding any article, however express, in the partnership agreement, a course of conduct by all the partners inconsistent with it would be evidence that they had agreed to vary the terms of the agreement. The maxim "*modus et conventio vincunt legem*" is especially applicable, but his attempt to apply the rule to this case failed upon the evidence, Steinhoff having no knowledge of this dealing.

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BURTON, J.A.

Whether Lillie would have been warranted in paying off the mortgage without consulting his partner may be very doubtful, but it is not necessary to express any opinion upon it.

Mr. Crerar made the most of his case, but I apprehend that he had no great confidence in securing a reversal of the judgment, and I feel quite sure that if he had been consulted he would not have sanctioned the course pursued by his clients.

The case appears to me to be so plain that I have not thought it necessary to consult the authorities to which we were referred.

The appeal must, I think, be dismissed.

OSLER, J. A.:—

I am of the same opinion.

MACLENNAN, J. A.:—

This is an action of covenant against partners. The plaintiffs held a mortgage upon two parcels of land which were in default. The defendants were bankers, and the mortgagor had become indebted to them in the usual course of business, and they took from him an absolute conveyance of his equity of redemption expressed to be for a nominal consideration. It was proved, however, and not disputed, that the conveyance was taken not as a purchase of the land but as security for the debt due to the defendants. The plaintiffs were pressing for their mortgage debt, and the defendant Lillie, without any express authority from his partner the defendant Steinhoff, and without his knowledge or consent, executed the covenant in question. It is expressed to be made between Steinhoff & Lillie and the plaintiffs, and the signature opposite to the seal is in the same name, which was the firm name used by the partners in their business. The consideration is expressed to be an agreement by the plaintiffs to allow time for the payment

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of arrears, and thereby Steinhoff & Lillie purport to covenant with the plaintiffs to pay the principal and interest secured by the mortgage. Whether Lillie could or could not, under these circumstances, have bound his partner Steinhoff by paying off the prior mortgage with partnership money, or by a simple contract in writing to do so, I express no opinion, but it is clear he had no authority to bind him by a deed executed on his behalf, merely because they were partners in business: Lindley on Partnership, 5th ed., p. 137; Story on Partnership, 6th ed., sec. 117. I think this is the deed of Steinhoff or it is nothing. It is unquestionably the deed of Lillie, and I do not see how it can be Lillie's deed and a simple contract of Steinhoff. I, therefore, think that the appeal fails.

Appeal dismissed.

THOMSON v. HUGGINS.

Chose in Action—Equitable Assignment—Building Contract—Default—Bills of Exchange and Promissory Notes.

The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of" (plaintiff) "$400 value received and charge to account of" (contractor), and the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than $400 of the contract price had yet to be earned, and the defendant put an end to the contract and completed the building, the cost being more than the contract price:—

Held, reversing the judgment of ROBERTSON, J., that the order was not a bill of exchange because the time for payment was indefinite, nor an equitable assignment because the fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor, or some one on his behalf, and that by reason of his default no liability arose.

Brice v. *Bannister*, 3 Q. B. D. 569, distinguished.

Statement.

THIS was an appeal by the defendant from the judgment of ROBERTSON, J., delivered on the 27th of May, 1895, as follows:—

This action was tried before me at the last non-jury sittings at Hamilton, and is brought to recover the sum of $400 and interest claimed by the plaintiff on an instrument in writing signed by one Lovell, who was a contractor and had agreed with the defendant to do the carpenter and joiner work of a building for the defendant, and which instrument was accepted in writing, endorsed thereon by the defendant, and is in the following words:—

$400. Niagara Falls, August 26th, 1894.

On completion of contract on building now in course of erection, pay to order of Robert Thomson & Co., of Hamilton, four hundred dollars, value received, and charge to account of "J. LOVELL."

To CHAS. HUGGINS,
Niagara Falls, Ont.

Across the face of this is an acceptance written by the defendant and signed by him, in these words:—"Accepted

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ROBERTSON, J.

payable at Niagara Falls, Ont., as payment for lumber used in my building." "C. A. HUGGINS."

August 29th, 1894.

I find the following facts on the evidence:—On the 11th of June, 1894, the defendant and the above named Lovell entered into a building contract under seal, for the erection of a frame block for the defendant in the town of Niagara Falls, agreeable to a set of plans, detail drawings, and specifications, prepared for the purpose by Wm. Nichols, architect; Lovell to supply all materials and labour required in the several trades of carpenter and joiner, and all builders' hardware, for the sum of $1,262, which the defendant agreed to pay in the following manner, that is to say:—75 per cent. of the value of all work done and materials supplied when roof was on and cornice completed, and the balance at completion of building to the satisfaction of the architect. The work was to be commenced immediately and prosecuted without any unnecessary delay and finished as soon as practicable, and should the builder at any time refuse or neglect to supply sufficiency of materials or workmen, the defendant should, after giving three days notice in writing, have power to supply same, and to finish the building and the expense incurred to deduct from the contract.

The plaintiff is a lumber merchant carrying on business in the city of Hamilton.

Lovell, the contractor, spoke to the defendant after the contract was entered into, and previous to the 26th of July, 1894, in regard to giving a note to the plaintiff for the value of the lumber which he, Lovell, proposed to purchase from the plaintiff for the building, and, after taking a couple of days to consider the matter, defendant promised Lovell that he would give such a note payable in two months. Relying on this promise Lovell wrote to the plaintiff on the 26th July, 1894, enclosing him a bill of the lumber required for the building, which he said he "had to build" for the defendant, and in which letter he stated, if the plaintiff would furnish the lumber, the defen-

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dant would give his note for the amount at two months as "he is getting his money by loan and will pay it at that time." The lumber amounted to $400. In consideration of the defendant's promise to give the note, the plaintiff supplied and sent forward immediately the lumber required. The plaintiff sent his book-keeper shortly after to the defendant to get the note. The book-keeper saw the defendant on the subject, and requested his note for the amount of the bill. The contractor went with him to the defendant. The defendant admitted that he had promised to the contractor that he would give the note in question as stated by him in his letter of the 26th of July, but that he (defendant) had reconsidered the matter subsequently and had changed his mind and had determined not to give the note. The book-keeper stated to the defendant that the plaintiff had supplied the lumber on his promise to give the note and not otherwise, and that the plaintiff insisted on having security for the amount. At this time the plaintiff was in a position to register a lien. The defendant then said he would accept the contractor's order for the amount, payable when the building was finished. Having no authority to receive an acceptance of that kind the book-keeper said he would report the proposal to the plaintiff. The lumber had been supplied about three weeks before. The result was that the plaintiff agreed to receive an accepted order drawn by the contractor on the defendant for the amount, and that fact was communicated to the contractor, and in due course the order, duly accepted by the defendant, was taken by the contractor and delivered to the plaintiff, and the defendant charged the contractor in his books with the amount immediately after. After that and up to the 22nd of September the defendant also charged the contractor with other moneys paid to him on account of the contract, and a meat account (the defendant being a butcher) which he had against the contractor, amounting to $120.74, making in all $1,036.04, leaving in his hands $225.96 due to the contractor when the building was completed. The defendant took from the contractor his receipt in writing for the above $1,036.04, dated the 22nd of September, 1894.

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On the 1st of October, 1894, the contractor made an assignment for the general benefit of his creditors, at which time he had not fully completed his contract; and the defendant afterwards completed it, at an expense of $79.86 over and above the claim of the plaintiff, and inclusive of his butcher bill of $120.74 and a note for $250, which he subsequently, on the 18th of September, had given to the contractor, as well as $200 in cash on the 5th of September—all of which sums were advanced by the defendant to the contractor after he accepted the order in favour of the plaintiff.

I find also that there is no doubt as to what the intention of the parties was in the transaction. Lovell intended giving, and the defendant taking, an order which was to be paid out of the contract price of the building which he (Lovell) was putting up for the defendant, and the defendant understood the order and acceptance by him as intended to deal with a portion of the contract price, and to be payable only out of that particular fund—there being in fact no other fund out of which it could be paid, and moreover he accepted it in writing and charged it to the contractor with other amounts subsequently paid to him on that contract. It is true there was nothing payable to the contractor at the time of acceptance as the roof was not yet on the building but the lumber had been used, and I have no doubt that, had the defendant not accepted the order, the plaintiff would, as he could have done, registered a lien on the defendant's property. Moreover, at this time, the plaintiff had not advanced anything to the contractor, unless the old butcher's bill, as to which no provision had been made in the contract; and besides this he paid to the contractor $200 in money some time thereafter, and still later gave him a negotiable note for $250, as well as other advances amounting to over $60.

This case, I think, is governed by *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 264, and is distinguishable from *Hall* v. *Prittie*, 17 A. R. 306. In the latter there was no acceptance of the order, which,

as I understand that judgment, made all the difference in favour of the defendant. I am, therefore, of opinion that the plaintiff is entitled to recover the full amount of the defendant's acceptance, $400, with interest from the date of the completion of the contract, which I find was on December 1st, 1894, with full costs of the action. Judgment. ROBERTSON, J.

The defendant appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd of January, 1896.

E. E. A. DuVernet, and *J. E. Jones*, for the appellant. There was, according to the finding of the learned Judge, an equitable assignment of a fund to arise *in futuro*. But an assignment only becomes a charge upon a particular fund when that fund comes into existence: *Bank of British North America* v. *Gibson*, 21 O. R. 613, and the order creating the charge being upon its face conditional upon the completion of the contract by the contractor, and the contract never having been so completed, the fund sought to be charged never arose: *Tooth* v. *Hallett*, L. R. 4 Ch. 242; *Brice* v. *Bannister*, 3 Q. B. D. 569; Hudson on Building Contracts, p. 188; *Whitaker* v. *Dunn*, 3 Times L. R. 602. The order is not a bill of exchange, for it is not unconditional, nor is it an equitable assignment: *Brown* v. *Johnston*, 12 A. R. 190; *Percival* v. *Dunn*, 29 Ch. D. 128; *Shand* v. *DuBuisson*, L. R. 18 Eq. 283; *Lamb* v. *Sutherland*, 37 U. C. R. 143. It is submitted that the learned Judge erred in holding that *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 264, applies, since in that case the question was merely one of priority of creditors to rank upon a fund that was in the hands of the Court. In *Hall* v. *Prittie*, 17 A. R. 306, the question simply was whether a certain document was to be construed as a bill of exchange or an equitable assignment, and the Court held that it was a bill of exchange, and that consequently the defendant could not be liable on it without acceptance. But the fact of

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acceptance cannot change an equitable assignment into a bill of exchange: *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 264, at p. 271; nor can the fact of non-acceptance alter the character of an equitable assignment: *Bank of British North America* v. *Gibson*, 21 O. R. 613; *Brice* v. *Bannister*, 3 Q. B. D. 569; so that in the present case whether the order is or is not an equitable assignment does not in the least depend upon the fact of acceptance or non-acceptance.

Watson, Q.C., and *S. F. Washington*, for the respondent. There is a direct liability on the part of the appellant to pay the respondent's claim irrespective of any agreement or understanding, or of any question as to the state of the accounts between the appellant and Lovell. The document sued on is an unconditional contract on the part of the appellant to pay the respondent four hundred dollars for lumber supplied by the respondent and used in the appellant's building on completion of the contract on the building; and the contract was completed before the action was commenced. It is not necessary for the respondent to rely on the document as an assignment of a chose in action, or to shew that the contract was completed by Lovell, for the respondent's right of action accrued when the contract was as a matter of fact completed, no matter by whom. The appellant having obtained the respondent's goods on the promise to give his promissory note for the price and by his course of conduct having induced the respondent to believe that he would pay the amount in any event and the respondent having relied on the appellant's promise to his detriment, the appellant is now estopped from asserting that he is not liable to pay the order in question. If the order is to be treated as an equitable assignment the evidence shews that after the order was given there was a sum of money due Lovell on the contract more than sufficient to pay the respondent's order, but the appellant, instead of retaining the amount of the order in his hands, as he should have done and was bound to do, paid over to Lovell more than five hundred dollars, ignoring altogether

the respondent's order and his acceptance thereof and liability thereon. Under these circumstances the respondent submits that there came into existence under the contract a fund amounting to over five hundred dollars upon which the respondent's order attached, and that in paying Lovell out of such fund with notice of the respondent's claim the appellant acted at his peril and cannot now claim that such payments should avail him as against the respondent's claim. The words in the order "on completion of contract" refer to and are intended only to limit the time for payment of the order and are not in any sense a condition. Argument.

E. E. A. DuVernet, in reply.

March 10th, 1896. OSLER, J.A.:—

I think that the appeal should be allowed. The plaintiff cannot rely upon anything which passed between Lovell and the defendant before the order was given, if for no other reason than this, that he accepted the order without insisting upon a more definite security, or the security which Lovell told him Huggins had agreed or offered to give him. He asked for a note which the defendant refused to give, having changed his mind. The plaintiff must, therefore, rely upon the agreement he actually made with the defendant, which consists of an order and acceptance in the following form: "On completion of contract on building now in course of erection pay to the order of Robert Thomson & Co., of Hamilton, four hundred dollars, value received, and charge to account of J. Lovell. To Chas. Huggins." The defendant accepted thus: "Accepted payable at Niagara Falls, Ont., as payment for lumber used in my building." By this, therefore, the defendant promised to pay "on completion of contract." That time never arrived, for the contract never was completed, though not by reason of any default on the defendant's part.

On what ground then, in the face of the plain terms of

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the agreement, can it be said that the plaintiff shall be permitted to recover and throw upon the defendant the loss occasioned by the builder's default?

First it is said that the order was an equitable assignment of so much of the contract price for the erection of the buildings and that the defendant has made payments on account thereof to Lovell since the order was given, and the case of *Brice* v. *Bannister*, 3 Q. B. D. 569, is relied on. The learned trial Judge seems to have treated it as an equitable assignment and to have distinguished it, as he says, from *Hall* v. *Prittie*, 17 A. R. 306, on the ground that here the order was accepted. But an equitable assignment requires no acceptance to make it good and what we held in that case was that the instrument was not an equitable assignment, the fund out of which payment was to be made not being specified, but a bill of exchange, on which the defendant as drawee was not liable because he had not accepted it. Here the defendant has accepted the instrument, but it is not a bill of exchange, the promise to pay being at an indefinite time. The time may never arrive, but until it does the money is not payable.

I am not satisfied that the document is an equitable assignment, and for the same reason as in *Hall* v. *Prittie*, 17 A. R. 306, viz., that the fund is not specified, but conceding that it may be regarded as such why are not its terms to be observed? It is subject to a specified contingency, and so long as the defendant was ready to pay when the contingency happened there was nothing to prevent him from making payments to the builder as the work proceeded and for the purpose of enabling him to carry it on. The contingency in fact never happened, for the building never was completed under the contract: so that the contract never was completed and the time for payment of the money never arrived. The builder failed to perform his contract and the defendant, the building owner, put an end to it and himself completed the work. This distinguishes the case

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from *Brice* v. *Bannister*, 3 Q. B. D. 569, 577, where, though the builder failed, he nevertheless completed the work as contractor building under the contract with the defendant and so the assignment attached upon the contract price, See also *Tooth* v. *Hallett*, L. R. 4 Ch. 242. Here, had it been possible to do so, the owner might have completed the work for less than the contract price and yet would have been under no obligation to account to the builder for the difference.

Then it is argued that because, while the contract was on foot, the amount of the order was taken into account between the owner and contractor in the latter's book and in the receipt which passed between them, the plaintiff is in some way entitled to treat the $400 as money in the defendant's hands to his use. I do not see on what principle that can be, or how it can affect the contract between the plaintiff and the defendant. The plaintiff is no party to these documents—is ignorant of them—and does not act upon them. They are no more than memoranda as to the state of the accounts between the parties looking to how they will be when the contract is completed, and the result is nothing more than to set aside so much of the contract price to meet the plaintiff's order when the time for its payment arrives.

There is no novation, as has now been suggested, because the liability of Lovell to the plaintiff has never, that I can see, been discharged. Even if there were, the terms of the new contract with the defendant must be observed and the time for payment of the money under it has not arrived, and now never can, because owing to Lovell's default the defendant has been obliged to complete the building and has done so at a cost of some $70 or $80 more than the whole contract price. The position of the parties as regards their equities is equal; the defendant expends more than the contract price in order to finish his building, and the plaintiff loses his lumber, which he need not have done had he been careful and asked for a more

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stringent agreement or registered a mechanic's lien against the property.

I am, for these reasons, of opinion that the judgment of Robertson, J., should be reversed and the action dismissed.

MACLENNAN, J.A. :—

This is a case of hardship, whichever of the parties is entitled to succeed in the appeal. The case alleged by the plaintiff is that before the lumber, the price of which is sought to be recovered, was supplied, there was an agreement between himself and Lovell and the defendant that if the plaintiff would supply the lumber to Lovell the defendant would pay the plaintiff $400 of the price. If that had been made out, I think the plaintiff would have been entitled to recover, because he did afterwards supply the lumber, and it was used in the construction of the defendant's house. There was, however, no agreement between the plaintiff and the defendant before the delivery. What took place about the $400 was between the defendant and Lovell alone, and according to Lovell's evidence what the defendant promised to do was to give his note to help him to get the lumber. As between the defendant and Lovell there was no consideration for that promise, because by the building contract Lovell was already obliged to procure the lumber at his own expense, and the terms of payment were also therein provided for. Nor was the defendant informed, so far as appears, that Lovell was about to use his promise as an inducement to the plaintiff to supply the lumber. Under these circumstances I do not think the defendant was in any way affected by the letters of the 26th and 31st of July, written by Lovell to the plaintiff, and that the defendant was at liberty to withdraw from his promise.

The case, therefore, turns entirely on the order and acceptance of the 28th of August, which were given in lieu of what the defendant had promised, and what occurred afterwards. With regard to the order, I think the

words "on completion of contract on building now in course of erection," do not mean on completion of the building no matter by whom; but of the contract, that is by the contractor, or some one on his behalf. The order contemplated that Lovell would go on and finish the work, and then the defendant would pay the plaintiff $400 out of what should be coming to him. Lovell, however, did not finish the contract at all; but before it was finished and while about $700 worth of labour and materials remained to be supplied, made an assignment for the benefit of his creditors, and the plaintiff had himself to take over the work and finish it. Great stress was laid upon an account found in the defendant's memorandum book, and on a receipt, corresponding with that account, obtained by him from Lovell on the 22nd of September, acknowledging payments on account of the contract price to the amount of $1,036.04. One of these payments so acknowledged is expressed to be "order to Thomson $400." The total contract price was $1,262, so that there was still a margin over and above the $400 for finishing the work of nearly $200, and the defendant had a right to expect that Lovell would complete the work.

If the $400 had been an item of cash, I incline to think the plaintiff might have recovered it from the defendant as money had and received to the plaintiff's use. But it was not an item of cash, but just what it is expressed to be, an order to Thomson, and it was quite right to charge it to Lovell, although it was not an item actually paid, but only to be paid on a certain contingency. As a receipt it means no more than that he has accepted that order at Lovell's request. I was for some time inclined to think that the effect of this receipt was to afford evidence of a novation, and of an agreement by all parties that the defendant had become the plaintiff's debtor and that so much of Lovell's debt to the plaintiff had been extinguished. I now think, however, that that would be an erroneous view of the case, and that the words "order to Thomson" on the

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receipt mean no more than the actual fact that he had accepted and might have to pay the order in question.

I am unable, therefore, with respect, to agree with the judgment of my learned brother Robertson, and think that the appeal should be allowed.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal allowed.

BÉCHERER V. ASHER.

Principal and Agent—Sale of Goods—Undisclosed Principal.

Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority of his employers.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, considered.

Judgment of MACMAHON, J., reversed.

Statement.

THIS was an appeal by the defendants from the judgment of MACMAHON, J.

The action was brought to recover from the defendants $501.65, the price of goods sold and delivered by the plaintiffs to one Becket, who was, as the plaintiffs alleged, an agent of the defendants with authority to purchase. The plaintiffs were wholesale merchants carrying on business in Montreal as dealers in crockery, glassware, etc., and the defendants were wholesale merchants carrying on business of the same kind in Toronto. The defendants had under their control a number of shops in different places in Ontario where retail business was carried on for their benefit, the goods being supplied by them. Becket was one of the agents or salesmen so employed by the defendants, and a retail business was carried on by him for some time in Toronto. Becket was at first paid a salary by the defendants, and they admitted that they knew that he

while in Toronto purchased some goods from other firms. In 1893, while this Toronto business was being carried on, Becket ordered goods from the plaintiffs' traveller, but before they were delivered Becket moved to St. Catharines, and these goods were forwarded by the plaintiffs to him there. In May, 1891, the defendants ceased to pay Becket salary, and after that he was responsible for all the expenses of the business, and depended for his remuneration upon what he could make over and above the invoice price of the goods, which, until sold, remained the property of the defendants. The shop in which the St. Catharines business was carried on was rented by Becket in his own name; the business was carried on as his and he took out in his own name an auctioneer's license; but he had been expressly instructed by the defendants not to purchase goods from other houses. The goods for the price of which the action was brought were sold by the plaintiffs' traveller to Becket in St. Catharines, and at that time the plaintiffs had no knowledge that the defendants had anything to do with the business. In December, 1893, the defendants gave notice to Becket that it was not worth while keeping the business open any longer, and Becket returned to them $578.87 worth of goods, that being the balance in the defendants' books against the St. Catharines business, the account being headed "Asher & Leeson, St. Catharines." Among the goods so returned to the defendants were a few articles purchased by Becket from the plaintiffs. Statement.

The action was tried at Toronto on the 6th of April, 1895, before MacMahon, J., who considered that the case was covered by *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, and gave judgment in favour of the plaintiffs.

The defendants appealed and the appeal was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ.A., on the 23rd and 24th of January, 1896.

Moss, Q. C., and *B. N. Davis*, for the appellants. The case of *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, is distin-

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guishable. There was a limited agency to buy in that case, but here there was no authority to buy at all. Moreover, that is not a satisfactory decision. It has been explained in *Johnston* v. *Reading*, 9 Times L. R. 200, and has been criticised in 9 Law Quarterly Review, at p. 111, where *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97, relied on in the *Watteau* case, has been doubted. In an article in 37 Solicitors' Journal, at p. 280, the *Watteau* case is also referred to as introducing a novel principle. It is inconsistent with *Miles* v. *McIlwraith*, 8 App. Cas. 120. See also 7 Harvard Law Review, at p. 49. There was no agency here, and the defendants cannot be held liable for goods sold by the plaintiffs to Becket, on Becket's own credit: *Ex parte White*, L. R. 6 Ch. 397; *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; *Hechler* v. *Forsyth*, 22 S. C. R. 489.

E. E. A. DuVernet, and *J. E. Jones*, for the respondents. It is clear on the evidence that the St. Catharines business was really that of the appellants, and they cannot escape liability by attempting to make out that Becket purchased goods against their instructions. They were aware that he had been buying goods, and they admit that he was at one time their agent to carry on a branch business, and they have not discharged the onus cast upon them to prove the discontinuance of this relation: *Pole* v. *Leask*, 9 Jur. N. S. 829. The case of *Ex parte White*, L. R. 6 Ch. 397, does not apply. There the wholesale dealer had no interest in the retail business and had no voice in its management; and in *Ex parte Bright*, 10 Ch. D. 566, at p. 572, it is pointed out that *Ex parte White* turns upon the special facts there proved. This case cannot be distinguished from *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, and the doctrine that an agent's powers, so far as they are incidental to the ordinary conduct of the business carried on by him, cannot be restricted by any private arrangement between the agent and his principal, applies.

Moss, Q. C., in reply.

March 10th, 1896. HAGARTY, C. J. O. :— Judgment.

HAGARTY, C.J.O.

The difficulty here is to see the defendants' liability for the goods sold to Becket. The plaintiffs knew nothing of the defendants, but sold to Becket on his credit and name. Long afterwards they learn of his connection with the defendants.

The defendants knew that Becket while in Toronto was occasionally purchasing goods from others. But one of them swore that when the business was transferred to St. Catharines he told Becket not to buy any goods from others, as such goods would compete with their goods.

They insist that all they had to do with him was that all goods sent to him were to be sold by him at any price he pleased, but he was to account to them for the invoice price, neither more nor less.

The goods were to continue to be the defendants' goods until sold, and they could require Backet to return them on request.

He was to be allowed $7 per week.

The business was closed about December, 1893. The plaintiffs' goods were there with those supplied by the defendants, and the bailiff seized for rent and taxes.

The defendants claimed the goods there as their own, as they say, not knowing that any other goods were there, and $578 worth of goods were sent back to the defendants at Toronto, amongst them being a few of the plaintiffs' goods.

In the end the bailiff, claiming for rent and taxes, made a seizure, and most of the goods furnished by the plaintiffs were sold by him.

The plaintiffs' case is thus presented. They found Becket in possession of this store or shop at St. Catharines, apparently carrying on the same kind of business as they knew him doing on Queen street, Toronto. He represented it as his business, and that he had a stock worth some $1,400. Assuming and believing the business to be his, they sell him goods as they had previously done in Toronto. Had they known his true position, they would, of course, not

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HAGARTY, C.J.O.

have given him credit. The goods thus sold were apparently goods used and required for the business he was carrying on.

After his failure to pay they discover for the first time the true state of affairs. They now claim to recover from the defendants, as it appears they had put Becket in the position to deceive them and obtain their goods on credit.

But the objection to this is that the evidence does not bring the case within the principles shortly stated in 2 Ruling Cases 357, and the distinction drawn between a general and ostensible authority and a particular authority.

An act of the agent in the first case may charge his principal within the scope of dealing, although the particular act was contrary to instructions.

In Evans's Law of Principal and Agent, 2nd ed., p. 118 *et seq.*, the statement is cited of Cockburn, C. J., in *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97: "The well established principle is that if a person employs another as an agent in a character which involves a particular authority, he cannot, by a secret reservation, divest him of that authority."

And in Story on Agency, 9th ed., sec. 17, it is said: "A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business or employment": See also section 443.

But it seems difficult to apply to the state of facts here the ordinary principles of the law of principal and agent.

The trial Judge decided in favour of the plaintiffs expressly on the authority of *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346.

The facts are different. The defendants employed Humble as manager of a hotel previously assigned by him to them. He had formerly carried on business there for himself; he held the license, and his name was on the door. He had no authority to buy any goods for the business except bottled ale and mineral waters; all other goods were supplied by the defendants. Humble bought some boxes of cigars from the plaintiffs on his own credit, given alone to him.

The Divisional Court (Lord Coleridge and Wills, J.)

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HAGARTY, C.J.O.

held the defendants liable; that the cigars were usual to be supplied and dealt with in an hotel like this, and that the defendants were liable, as Humble's act was within the authority usually confided to an agent of that character, notwithstanding limitations as between the principal and the agent, citing *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.

In *Johnston* v. *Reading*, 9 Times L. R. 200, Lord Coleridge explains *Watteau* v. *Fenwick* as decided on the ground that the articles ordered by the manager were such that the business could not be carried on without them, and he was obliged to order them.

Watteau v. *Fenwick*, is doubted by Sir F. Pollock, in 9 Law Quarterly Review, p. 111.

There is no evidence in the case for judgment, that there was any authority, express or implied, on the defendants' part that any goods should be ordered on their account or for the purposes of Becket, or that other goods would be required or necessary for the purposes of the dealing between him and the defendants; nor could the defendants reasonably anticipate any purchase of goods by him. He was there, in a shop hired by himself, to sell the goods which the defendants might send to him, so that they received invoice prices for them, and till sold they remained the defendants' property.

Sir G. Mellish says in *Ex parte White*, L. R. 6 Ch. 397, at p. 403: "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent."

In *Ex parte Bright*, 10 Ch. D. 566, Jessel, M. R., points out the distinction. In this case on a contract to sell the goods, the property as here remaining with the vendors till sold, and on *del credere* agreement guaranteeing payment by the vendees, it was held that the relation was that of principal and agent.

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HAGARTY, C.J.O.

The plaintiffs' dealing was wholly with Becket. They were doubtless deceived by him as to the ownership of the stock, and business, and trusted him on such false representation. But I cannot see that a liability is made out against the defendants. Becket was either a mere factor to sell the defendants' goods or an agent merely for such purpose, in no way involving any right to pledge the defendants' credit for goods unconnected with his employment.

BURTON, J. A. :—

The evidence disclosed that Becket was in charge of a supply store selling the goods of the defendants, and receiving his remuneration from the excess of the selling price over the invoice price, for which he was to account. He had no authority to pledge the defendants' credit for the purchase of any goods which he might choose to buy, and it is clear, therefore, that the law in reference to the liability of an undisclosed principal does not apply.

Notwithstanding the doubt cast upon *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, upon which the learned Judge based his judgment, I think it was well decided, but that case may well stand and yet not affect the present case. Once established that the parties occupy the position of principal and agent in a business where the usual course is for the agent to do the acts under which it is sought to charge the principal, it may well be that a secret limitation would not prevail to defeat the action against the principal. Here Becket had no such authority or apparent authority; he was simply employed to sell the defendants' goods, which would not authorize him to pledge their credit for other goods, and the case therefore fails, and the appeal should be allowed.

OSLER, J. A. :—

I think that the appeal must succeed. What the plaintiffs had to establish was that the goods they sold to Becket were, under the circumstances, sold to him as the defendants' agent, and that they are liable for the price as being his undisclosed principals.

Judgment.

OSLER, J.A.

It is shewn that the defendants established Becket in Toronto for the purpose of selling their goods to be consigned to him. He rented the shop in his own name, took out the license and carried on the business under the name of S. C. Becket (not S. C. Becket & Co.). The defendants paid the rent of the Toronto shop, and Becket was paid by them while there a weekly salary. He was not authorized to buy goods from any one, and was there, so far as the defendants were concerned, for the purpose of selling such goods as they might consign to him. Afterwards he went to St. Catharines, where he carried on a business for the defendants in very much the same way, though he paid the rent of the shop and other expenses out of his own commission or salary. At both places he bought goods from the plaintiffs, who sold to him in ignorance of his relation to the defendants. He did so, so far as appears, for himself, the defendants having no interest in or claim upon them, nor did he account to the defendants for their proceeds. One of the defendants said that Becket while carrying on business in Toronto had told him that he was buying goods and keeping a separate account from theirs.

A great many other facts were introduced into the case which appear to me unimportant; nor do I think it material whether the business, as Becket was instructed by the defendants to do it, is called his business or the defendants.

The broad question is whether the defendants by placing Becket in a position in which had he been known to be an agent he might be supposed to have authority to buy such goods as he was dealing in, are estopped from denying that he had a general authority to buy, although in fact he had no authority to buy at all for the defendants, and the plaintiffs dealt with him as principal, not knowing him to be an agent.

The only answer, in my opinion, which the question admits of is that in such circumstances the defendants cannot be liable as undisclosed principals. The case is dif-

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ferent from *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, which was relied on in the Court below in at least two respects, viz., that there the agent who had contracted as principal had authority to buy some kinds of goods for the business though, as to others, his authority was limited to buy them from the defendants themselves, and secondly, on which fact alone the judgment might stand, that the goods which he in fact bought, though beyond the scope of his authority, went into the defendants' business. Whether that case is well decided we need not now determine. It has been sharply criticised, and, it would seem, not without reason: see 37 Sol. Jour., p. 280.

Here there were three things. 1. No authority to buy at all, no general agency. 2. A contract with the person now alleged to be an agent, as principal. 3. No knowledge that the relation of principal and agent existed for any purpose between that person and the defendant.

Had Becket been in fact an agent with authority to buy, and if *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, be good law, even with a secret limitation upon his authority the plaintiffs might, on discovering that the defendants were his principals, have resorted to them for payment, though they had dealt with Becket in the first place as principal in ignorance of his agency and, of course, of the limitation upon his authority. Or had he, though not an agent with authority to buy, been accredited or held out by the defendants as general agent, they would be estopped from denying his authority, and the plaintiffs could recover against them in that case also. But where there is neither agency in fact nor any holding out as agent and the dealing is with the party as principal, there can be neither undisclosed principal nor principal by estoppel. And where there are general agents of an undisclosed principal, with a special restriction or limitation of their authority, one who contracts with them as principals can only resort to the real principal subject to the limitation which has been placed upon the agents' authority, because he had not dealt with them as agents, nor had there been any holding of them out or

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accrediting them as such, and so, no contracting upon the faith of the authority. This, I think, is what is decided by the case of *Miles* v. *McIlwraith*, 8 App. Cas. 120.

There certain shipping agents, who were the general agents of the respondent, had entered into a contract contrary to the express restriction of the latter. The contract would have been within the scope of their apparent authority had they been known to be agents, but the parties with whom they contracted contracted with them as principals, ignorant that they were the respondent's general agents, and, of course, of the restriction upon their authority. It was held that as the fact of the general agency was unknown to them and they did not act on the belief that the authority continued unrestricted, they could not have held the respondent bound to them.

I refer also to the well known case of *Pole* v. *Leask*, 9 Jur. N. S. 829 (H. L.), which is strongly opposed to the right of the plaintiffs to recover, and to Ruling Cases, vol. 2, p. 357, as to how a general agency may be proved.

The present case, I think, comes entirely within the decision of the Judicial Committee in *Miles* v. *McIlwraith*, 8 App. Cas. 120, and therefore the appeal must be allowed.

MACLENNAN, J. A. :—

I am of opinion that this appeal must be allowed. With great respect, I do not think it is governed by *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, which was cited to the learned Judge. In that case the agent had authority from the defendants to carry on a particular business for them, but with a secret restriction with regard to the purchase of cigars. But for that restriction it would have been within the scope of his authority to buy cigars for the defendants wherever he pleased. Contrary to his secret instructions he purchased cigars from the plaintiffs instead of getting them from the defendants themselves. The business was carried on by the agent ostensibly as his own, and when the purchase was made the plaintiffs gave

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credit to the agent in ignorance that the business was not his. It was held to be a case of undisclosed principals, and that the purchase was within the scope of the general authority of the agent.

In the present case, Becket had no authority at all to buy goods for the defendants from any one. His agency was merely to sell the defendants' goods, and to account to them for them at certain prices. Until they were sold they were the property of the defendants. The present is not a case of undisclosed principal at all. Becket did not buy the goods in question for the defendants, but for himself, whilst, in *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346, the purchase by the agent was actually for and on behalf of the defendants, and the goods immediately became their property, and were afterwards sold for their benefit. Nor is there any question here as to the scope of the defendants' authority, for he had no authority at all to buy goods for the defendants.

The action ought, therefore, to be dismissed.

Appeal allowed.

WATERFORD SCHOOL TRUSTEES v. CLARKSON.

Principal and Surety—Bond—Public Schools—Secretary-Treasurer.

A secretary-treasurer of a public school board was appointed for a year on giving the necessary security, which he did by bond with sureties, without any limit as to time or any reference to the period of his appointment. He was reappointed each year for several years in the same way and on the same condition, but without fresh security being taken, and subsequently became a defaulter in respect of moneys received by him during his last year's appointment :—

Held, that the sureties were not liable for his defalcation.

Judgment of STREET, J., affirmed.

THIS was an appeal by the plaintiffs from the judgment of STREET, J. Statement.

The action was upon a bond, and came on for hearing upon a special case; judgment being delivered on the 23rd of November, 1895, in favour of the defendant as follows :—

STREET, J. :—

The material facts set out in the case were the following: On January 15th, 1890, one L. H. Slaght was, by resolution of the plaintiffs, the school trustees of Waterford, appointed secretary-treasurer "for the ensuing year by his giving the necessary security as per law." On February 13th, 1890, L. H. Slaght entered into a bond to the plaintiffs for the faithful performance of his duties, with Aaron Slaght and L. Becker as his sureties, the condition being the faithful performance of his duties as secretary-treasurer, the accounting for all moneys coming into his hands in that capacity, etc., without any limitation as to time and without any recital of or reference to the fact that his appointment was for a year only.

In January, 1892, in January, 1893, and in January, 1894, similar resolutions were passed by the plaintiffs, each of which purported to appoint him for a year only, and to require him to enter into the usual bond, but no bond was ever given by him excepting that above mentioned on

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STREET, J.

February 13th, 1890. He duly performed his duties and accounted for all moneys received by him during each year until 1894, when he failed to account for the moneys received by him. In that year, he and his surety Becker made separate assignments to the defendant Clarkson for the benefit of their respective creditors. The plaintiffs seek to prove their claim for the deficiency in Slaght's accounts against the estate of Becker, claiming to be entitled to do so under the bond of February 13th, 1890.

The question is, whether the liability of Becker under that bond extended to the year 1894.

The principles upon which this case is to be dealt with are plain and have been frequently laid down.

The appointment of Slaght as secretary-treasurer to the plaintiffs in January, 1890, was for one year only, and the sureties to his bond, whether aware or not of the period for which the appointment had been made, are entitled to ask, when called on to pay for his defalcations, whether those defalcations took place during the appointment existing when their bond was given or during some later one. The answer here is plain, that they are called on to pay for defalcations which took place long after the termination of the appointment existing when they entered into the bond.

There is no clause in the Act governing the appointment of secretary-treasurer to school trustees, which declares that the person appointed shall continue in office until his successor is appointed. Whether such a clause would have operated to extend the liabilty of the sureties in the face of a special appointment of the officer for a year only, can hardly, I think, be held to have been settled by *Beverley* v. *Barlow*, 10 C. P. 178. That case was decided upon the strict letter of the pleadings, in which, as the judgment points out, "there is no averment of any special appointment differing in terms from the provisions of the statute." The Court took judicial notice of the statute which provided that the officers appointed should hold their offices until removed by the municipal council for the time

being, and considered this provision to override the general statement in the plea that the appointment was an annual one. The case of *Adjala* v. *McElroy*, 9 O. R. 580, was still stronger against the sureties, for whilst the section just referred to was in force, the appointment of the treasurer was not limited to any particular period, and the bond of the sureties expressly covered the acts of the treasurer during his continuance in office. Judgment. STREET, J.

In the present case there is no statutory extension of the period fixed by the appointment, and that period must be taken to govern the liability of the sureties, whether they knew of it or not, as completely as if it had been recited in the bond, upon the principle that the creditor and the debtor cannot, by arrangement between themselves, extend the liability incurred by the surety without his consent: *Wickens* v *McMeekin*, 15 O. R. 408, and the cases there referred to.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th of February, 1896, and an application for leave to amend was made as mentioned in the judgment of MACLENNAN, J. A.

Wilkes, Q. C., for the appellants. The effect of R. S. O. ch. 225, sec. 113, sub-sec. 1 (*a*), is to introduce in principle the municipal regulations as to organization and duties of officers. The treasurer of a municipality holds office during the pleasure of the council: R. S. O. ch. 184, sec. 279, and the same rule should apply to the treasurer of a school board. A bond with a general condition, without restriction as to time, is good so long as the treasurer acts: *Beverley* v. *Barlow*, 10 C. P. 178; *Adjala* v. *McElroy*, 9 O. R. 580.

Cassels, Q. C., for the respondent. The treasurer was a trustee and could only act as treasurer while he was trustee, so that of necessity his appointment as treasurer was for a fixed period. *Adjala* v. *McElroy*, 9 O. R. 580, is quite a

Argument. different case. There was no renewal there, and there was a general appointment in the first place. The reasoning in the judgment appealed against is unanswerable.

Wilkes, Q. C., in reply.

March 10th, 1896. HAGARTY, C. J. O. :—

We assume this to be an incorporated village not divided into wards: R. S. O. ch. 225, sec. 96. The trustees continue in office two years.

The bond sued on was given in February, 1890, and must be construed in the light of the Public School Act of 1887. The Consolidated Act of 1891, part of which was relied on by Mr. Wilkes, does not govern.

The appointment was made under section 113, the duty of the board being "to appoint a secretary-treasurer and one or more collectors, if requisite, etc."

By section 113, sub-section 1 (*a*), the collectors and the secretary-treasurer, who may be of their own number, shall discharge similar duties and be subject to similar obligations and penalties, and have similar powers as the like officers in the municipality.

By section 125, moneys collected by the municipal council for school purposes are to be paid to the secretary-treasurer before the 15th of December in each year.

By section 254, if the trustees of any school section neglect to take proper security from the secretary-treasurer, they shall be personally responsible.

Mr. Wilkes contended that section 279 of the Municipal Act, declaring that all officers appointed by a council shall hold office until removed by the council applied.

The school trustees on January 15th, 1890, by resolution appointed Slaght secretary-treasurer "for the current year," and directed that he enter into the necessary security as per law.

The bond contains no reference to the resolution or to any annual or other limit but is general for Slaght's faithful keeping of accounts, disbursement of all moneys

Judgment.

HAGARTY, C.J.O.

by order of the council, all moneys collected by rate, bill, subscription, or otherwise coming into his hands by virtue of his office.

There is no entry as to 1891. In January, 1892, the trustees resolved that Slaght be secretary-treasurer for the ensuing year, by giving the usual bond as required by law.

In January, 1893, a similar resolution was passed. In January, 1894, a similar resolution, upon giving satisfactory bond, etc. But no bond was in any year given except that sued upon.

Up to 1894, he was faithful, but in that year became a defaulter.

It does not appear to be declared in any statute that his office was an annual office.

The resolution appointing him, was clearly for the current year, and, although not referred to in the bond, the bondsmen might well assume that they were only guaranteeing his conduct for the time for which he was appointed.

The learned trial Judge held that the sureties were not liable and the plaintiffs appeal.

The trustees, notwithstanding their omission to act in 1891, evidently thought they should appoint each year, and went through that form, declaring that new security must be given.

If this office had been declared by law to be an annual one, I think this action would fail.

But I feel difficulty in holding that where the creators of the appointment, viz., that of secretary-treasurer for the current year, the effect must not be the same as if declared annual by law.

They could appoint, where not restricted by law to an annual period, to say two years. But they exercise their right and appoint only for the year 1890.

Then the two sureties undertake for his due accounting for moneys "coming into his hands by virtue of his office." What office, it may be asked? It must be the office to which he has been appointed.

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HAGARTY, C.J.O.

The principal may be assumed to tell his friends to what he has been appointed, *i.e.*, for the year, and ask them to be his sureties. They consent. I think they might, with great reason, assume that they only incurred one year's liability: *Amherst Bank* v. *Root*, 2 Metc. 522.

In *Adjala* v. *McElroy*, 9 O. R. 580, the office was that of township treasurer, and under the Act such an officer was to hold office until removed by the council, and the bond provided for his due performance, etc., and paying over moneys received "during his continuance in office."

Beverley v. *Barlow*, 10 C. P. 178, was (as my brother Street remarks), decided on a question of pleading.

It was also under the provision as to officers holding until removed, etc.

It may be conceded that a continuing of a man in office is not a removal. In *Mayor of Cambridge* v. *Dennis*, E. B. & E. 660, at p. 666, Lord Campbell says: "According to the authorities, when the office in respect of which the security is given is for a year only, express words are required to make the security extend to more than the year."

The language of Coleridge, Erle, and Crompton, JJ., is suggestive.

In *Adjala* v. *McElroy*, 9 O. R. 580, the treasurer's bond was for performance of his duties, "so long as he shall remain in the said office," the same statutable provision existing as to remaining till removed by the council.

Does this provision in the Municipal Act, section 279, extend to school boards in villages?

The secretary-treasurer is to discharge similar duties, and be subject to similar obligations and penalties, and have similar powers as the like officers in the municipality.

Section 279 of the Municipal Act directs that "all officers appointed by a council shall hold office until removed by the council."

I am unable to see that the words used include any direction as to the tenure of office. "Duties," "obligations," and "powers," cannot, I think, be held to extend beyond their immediate meaning.

Judgment.

HAGARTY, C.J.O.

In the Consolidated Act of 1891, I do not find the words above quoted as to the Municipal Act.

There is no doubt but that, if the tenure of office be annual by statute, the liability of sureties is not, except by express words, extended beyond the year.

Shaw, C. J., says, in *Amherst Bank* v. *Root*, 2 Metc. 522, at p. 538: "A bond that (the cashier) shall faithfully perform the duties of cashier, will include duties performed after the limited time for which he is chosen, and during the time that the office is continued by force and operation of law."

The very strong and pointed language of Dewey, J., dissenting, may be worth perusal.

My brother Street has discussed the question in *Wickens* v. *McMeekin*, 15 O. R. 408, relying on *Kitson* v. *Julian*, 4 E. & B. 854.

On the whole, I arrive at the conclusion that we ought not to interfere with my brother Street's decision.

The appointment was clearly for one year only; there was no law providing for the time of the officer's tenure, and I think we must conclude that the sureties only undertook for his faithful disbursement of all moneys, etc., coming into his hands "by virtue of his office," which was his office for one year.

BURTON, J. A.:—

There is no clause in the School Act in reference to the appointment of a secretary-treasurer which declares that the person appointed shall remain in office till removed, similar to that to be found in the Municipal Act, sec. 279.

In this case the secretary-treasurer was appointed in January, 1890, and by a strange error, was appointed for the ensuing year instead of the then current year.

In February, he and his sureties executed a bond in which no reference is made to the duration of his appointment, but it is conditioned *inter alia* for his paying over all moneys coming into his hands by virtue of his office. That

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BURTON, J.A.

appointment would cease at the end of that year unless he was re-appointed; which he was in several succeeding years, and I presume in each succeeding year till 1894, although there is nothing to shew a re-appointment in 1891.

I should have thought it too clear for argument that the responsibility of the sureties ceased in December, 1890, unless Mr. Wilkes' argument is sound that the provisions of the Municipal Act are imported into the School Act, so as to make the appointment similar to those of municipal officials during pleasure as there expressed, until removed by the council. For this I understand him to rely on section 113 of the Public School Act, which declares that the secretary-treasurer shall discharge similar duties and be subject to similar obligations and penalties, and have similar powers as the like officers in the municipality.

It may be difficult to put a construction upon these words, as there are no like officers in a municipality. It is intended probably to mean that so far as possible they should perform similar duties to those performed by a treasurer of a municipality, and be subject to the same penalties as are provided for the neglect to perform the duties of that office, but it seems to me to be a very strained construction to extend those words to the tenure of the office.

I agree, therefore, with the judgment below, that the sureties are not liable for the defaults of the secretary-treasurer for the years subsequent to 1891, and that the appeal should be dismissed.

OSLER, J. A.:—

It can hardly be doubted that the insolvent, upon whose estate the plaintiffs seek to prove their claim against their defaulting secretary-treasurer, became surety for him on the faith of the resolution of the 15th January, 1890, by which he was appointed secretary-treasurer "for the ensuing year, by his giving the necessary security as per law."

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OSLER, J.A.

During that and the next following year, Slaght, the principal, was also a member of the school board, his term of office expiring in December, 1891, when he was re-elected. There would seem to have been no formal re-appointment as secretary-treasurer for 1891, though I infer from the special case that he continued to act as such in that year. In January, 1892, and January, 1893, he was again appointed by resolution in similar terms secretary-treasurer for the current year; and in January, 1894, he was appointed "secretary-treasurer of this Waterford public school board," not specifying for the current year. No fresh bond was given, although in each year the resolution appointing him, required him to enter into "the usual bond required by law."

The question is, whether the bond of 1890 extends to make the sureties therein liable for the deficiency of 1894, the only year in which default was made. The bond is not, as in some of the cases, conditioned that the principal shall account so long as he shall continue in office, or so long as he shall act as agent or treasurer; and his re-appointment at regular intervals at the commencement of the school year, coupled with the express language of the resolution and condition in each instance that he should give fresh security for the performance of his duties, is a strong indication that the appointment was regarded as an annual one. I say that fresh security was required, because one resolution appoints a person to "receive" the bond named therein, and the others appoint persons who are to look into its "sufficiency" and "efficiency," and to file the same in the office of the clerk of the municipality, language quite inappropriate to a bond or security already in existence and in the plaintiffs' custody, or that of the proper officer.

The defendants rely upon section 113, sub-section 1 (*a*), of the Public Schools Act, R. S. O. ch. 225 (sections 107 and 128 of the Public Schools Act 1891, 54 Vict. ch. 55), which enacts that it shall be the duty of the board to appoint a secretary-treasurer who shall discharge

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similar duties and be subject to similar obligations and penalties and have similar powers as the like officers in the municipality; and they contend that this provision imports into it section 279 of the Municipal Act, which enacts that all officers appointed by a council shall hold office until removed by the council. Hence, they argue, the office was one which the officer, having once been appointed, would hold without re-appointment and until actual removal, the resolutions re-appointing him being merely a manifestation of the intention of the board that he should continue to hold his office for another year, unless they should in the meantime think fit to remove him. If this were the proper construction of the Act, it is quite possible that the authorities would make it necessary to hold that the bond of 1890 would extend to make the sureties liable for the defalcations of future years, as it is not in terms limited to those of 1890. I am of opinion, however, that we cannot give to the language of section 113, sub-section 1 (*a*), the large construction contended for, so as to include in the "duties," "obligations," "penalties" and "powers" it refers to, the term of tenure of the office. The natural meaning of these expressions as applied to what the officer can or may, or ought to do, sufficiently indicate what is intended by the section, without compelling us to bring within their scope the special provision of section 279 of the Municipal Act. The fact, moreover, that the officer may be one of the board (which is a departure from the principle of the latter Act), I regard as in itself indicative that it was not the intention of the Legislature to make the office a continuing one.

For these reasons, I think the case distinguishable from those which have been decided as to the liability of sureties of an officer appointed under the Municipal Act. We have here no statute declaring that the appointment of secretary-treasurer shall be regarded as an appointment during pleasure, or that he shall hold office till removed by the board.

Judgment.

OSLER, J.A.

The appointment was expressly made for a year, and the bond, in my opinion, must have relation to that appointment, and not to subsequent ones. There is no case which, under these circumstances, requires us to hold that the appointment did not come to an end when the terms of the resolution were exhausted.

Mr. Wilkes desired that some new facts might be introduced by way of amendment of the special case, but no sufficient grounds were shewn to warrant our interference; nor do I wish to be understood as assenting to the view that if they were properly before us, they would affect the defendant. The trustees who neglected their duty are, it is to be hoped, sufficiently substantial to assure the board against loss.

I think my brother Street's judgment should be affirmed.

MACLENNAN, J. A. :—

On the opening of this appeal the appellants asked leave to amend the special case by introducing a paragraph alleging that the principal debtor and the surety were partners in business, and that the school moneys in question were deposited with the firm. I do not see how we could grant that application, or what use could be made of such an amendment. It may be that if the money was so deposited with the knowledge of the surety, the appellants could obtain redress on the principle of following trust money; but there is no case of that kind made. It may be too that relief can be obtained under section 200 of the School Act of 1891, 54 Vict. ch. 55 (O.), but neither is any case of that kind alleged.

Upon the case before us, I think we must affirm the judgment. Section 113 of the School Act, R. S. O. ch. 225, was relied upon for the purpose of shewing that the officer's appointment was a general one, and was on the same footing as that of a municipal treasurer, but I do not think it does so. The appointment was in express terms for a year, and I think it came to an end just as it was expressed, and

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MACLENNAN, J.A.

as it was regarded by the board, and it is noticeable that clause (*a*) of section 113 was omitted from the Act of 1891, and was not re-enacted: see section 107 of the new Act.

I therefore think that the appeal must be dismissed.

Appeal dismissed.

WANLESS v. LANCASHIRE INSURANCE COMPANY.

Insurance—Fire Insurance—Variation from Statutory Conditions—Co-Insurance.

A provision in a fire insurance policy that "the assured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her or their proportion of any loss," is a condition and not a mere direction as to the mode of ascertaining the amount of the loss, and it is void if not printed in accordance with the provisions of the Act.

Judgment of ARMOUR, C. J., affirmed.

Statement.

THIS was an appeal by the British America Assurance Company from the judgment of ARMOUR, C. J.

The action was brought against the Lancashire Insurance Company and the British America Assurance Company, to recover the sum of $3,226.84, under a policy of insurance for $4,000 in the Lancashire Insurance Company, and under an interim receipt for insurance of $6,000 in the British America Assurance Company. The interim receipt was issued on the 28th of February, 1895. The fire occurred on the 3rd of March, 1895, and after the fire the British America Assurance Company delivered to the plaintiffs a policy dated the 1st of March, 1895, containing the following provision:—

"Seventy-five per cent. co-insurance clause. It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash

value thereof, and that failing so to do, the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any loss." Statement.

The Lancashire Insurance Company admitted that they were liable to pay to the plaintiffs two-fifths of the whole claim, and paid this sum into Court. The British America Assurance Company contended, however, that the co-insurance clause was binding, and that the actual cash value of the property insured being $28,732.51, the plaintiffs were co-insurers to the extent of $11,549.38, and that the proportion of the loss payable by the British America Assurance Company was only $898.45. There was no reference in the interim receipt to the co-insurance clause.

Upon this defence being raised, the plaintiffs contended that if they were not entitled to recover three-fifths of the loss from the British America Assurance Company, they were entitled to recover from the Lancashire Insurance Company whatever they did not recover from the British America Assurance Company; while the Lancashire Insurance Company contended that if the British America Assurance Company succeeded in establishing their contention as to the co-insurance clause, the Lancashire Insurance Company were entitled to share in the benefit by virtue of a provision in their policy, that "in case of the assured holding a policy in any other company on the property insured, subject to average, this policy shall be subject to average in like manner."

The action was tried at Toronto, on the 15th of November, 1895, before ARMOUR, C.J., who held that the insurance was intended to be effected with the co-insurance clause; and that there was a good contract, but that the co-insurance clause was a condition and was not binding upon the insured, because it was not printed in accordance with the requirements of the statute. He gave judgment, therefore, against the British America Assurance Company for $1,936.10 with interest and costs, and dismissed the action with costs as against the Lancashire Insurance Company.

Argument.

The British America Assurance Company appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, and MACLENNAN, JJ.A., on the 5th of February, 1896.

Lash, Q. C., for the appellants. The learned Chief Justice has found that a contract of insurance was made, and that the intention was to embody in that contract the co-insurance clause. As the policy had not been issued at the time the fire occurred, the objection is not open to the plaintiffs that the co-insurance clause was not printed in accordance with the statutory provisions. If, however, that objection is open, the answer to it is, that this is not a condition within the meaning of the statute. There is a contract made which leaves the amount of insurance to be fixed from time to time with reference to the amount of insurance maintained on the property by the plaintiffs, and this is simply a mode agreed on between the parties for ascertaining the amount of the loss.

Watson, Q. C., for the plaintiffs. The co-insurance clause cannot be read into the interim receipt; it is subject to the statutory conditions and no others: 55 Vict. ch. 39, sec. 33 (O.). It is a condition and it is void: *Findley* v. *Fire Insurance Co. of North America*, 25 O. R. 515; *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96; *May* v. *Standard Fire Insurance Co.*, 5 A. R. 605.

McCarthy, Q. C., for the Lancashire Insurance Company. There is either general insurance for $10,000, or else the plaintiffs are co-insurers, and in either view the Lancashire Insurance Company have paid into Court their full share of the loss.

Lash, Q. C., in reply.

March 10th, 1896. HAGARTY, C. J. O.:—

This co-insurance clause unquestionably varies condition nine in a most important degree.

It is in itself a very marked variance therefrom. I think it must be treated as a variation.

Judgment.

HAGARTY, C.J.O.

It is not put in with the other professed variations. It is left in the contracting part of the policy wholly away from and apparently unconnected with the statutory conditions and the variations therefrom.

It is quite true that it is in a conspicuous part of the policy, and an intelligent reader would naturally see it.

The statute was passed for all readers or policy holders, many of whom are not over intelligent. It seems to require express notice to persons insured to be given in a special form and manner. Condition nine is to govern, so the Act says. But it may be varied, but only in a given way: section 115:—If the company desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added in the instrument containing the prescribed statutory conditions, words to the following effect, printed in conspicuous type and in ink of different colours: Variations in conditions: This policy is issued on the above statutory conditions with the following variations and conditions, etc., etc.

Then, by section 116, no such variation, addition, or omission, unless the same is indicated in manner aforesaid, shall be legal and binding on the assured, etc.

No question as to its reasonableness shall arise, but the statutory conditions only shall govern unless the variations, etc., are distinctly indicated and set forth in manner aforesaid.

It seems impossible for us to hold that this co-insurance clause is not a variation from statutory condition No. 9, nor that it is inserted in the policy in the manner so specially directed by the Act.

The Chief Justice rightly held against the company on this ground.

It is to be noted that at the time of the fire the assured had nothing but the interim receipt of February 28th, in which there is no reference to this co-insurance clause, which first appears in the policy given to the plaintiffs after the fire.

I think that the appeal must be dismissed.

Judgment.

BURTON, J.A.

BURTON, J. A.:—

The only point reserved for our decision, was whether the plaintiffs were bound by the condition known as the co-insurance clause, binding the plaintiffs to maintain an insurance on the property to the amount of not less than seventy-five per cent. of the actual cash value, and failing so to do, to be regarded as co-insurers to the extent of such deficit.

I think that the answer given by the learned Chief Justice of the Queen's Bench Division is the proper one, that, not being set forth as required by the statute, it is not binding, and the plaintiffs are entitled, therefore, to recover against the British America Assurance Company its full average proportion of the loss as if such condition had not been contained in the policy. The appeal, therefore, should be dismissed.

The relief sought by the Lancashire Insurance Company would only arise in the event of the British America Assurance Company succeeding in its contention, and the action against them stands dismissed.

MACLENNAN, J. A.:—

I am of opinion that this appeal fails. The argument extended to a number of points to which, in the view I take of the case, it is not necessary to refer. The main argument was on the question whether the co-insurance clause, as it is called, is a condition within the meaning of the Insurance Act, R. S. O. ch. 167, as it was held to be by the learned Chief Justice.

It was inserted in a blank space in an ordinary policy, and was either printed or stamped thereon after the form was completely printed in other respects; and the assured was informed that he could have his insurance either with or without that clause, depending on the amount of premium to be paid.

The clause is in the following words: [The learned Judge read it and continued:]

Judgment.

MACLENNAN, J.A.

It was admitted by Mr. Lash that this clause is to a great extent novel and of recent introduction in fire insurance policies; and I think it may be said to be common knowledge that it is no part of the body and substance of the policies which have hitherto been in use by the companies. Then section 116 of the Act declares that the statutory conditions shall be deemed to be part of every contract; and that no stipulation to the contrary, or providing for any variation, addition, or omission, shall be binding unless evidenced as prescribed by sections 115 and 116. If the clause in question be an addition or variation of the statutory conditions, it is admitted that sections 115 and 116 have not been complied with. Now if we compare this clause with statutory conditions 8 and 9, it is evident, I think, that the one is as much a condition as the others, and that the clause must be regarded as both an addition to and a variation of those statutory conditions. By the effect of this clause, instead of being paid their whole loss in ratable proportion by the two companies as provided by statutory condition 9, the plaintiffs could only claim and recover from both less than half their loss. The clause says in effect to the insurer, no matter whether you have other insurance or not, what you shall recover shall be, not a ratable proportion of the loss, having regard to such other insurance if any, but only such a proportion as you would be entitled to under statutory condition 9, if you had insurance to the full amount of three-quarters of the cost value of your goods. I think that, having regard to the substance of the clause, it is in its nature a condition, and that it is both an addition to and a variation of the statutory conditions, as was the strong and clear opinion of the learned Chief Justice.

I, therefore think that the judgment should be affirmed.

Appeal dismissed.

STEPHENS v. BOISSEAU.

Bankruptcy and Insolvency—Assignments and Preferences—Surplus Proceeds of Sale of Mortgaged Goods.

The application by a chattel mortgagee of the surplus proceeds of sale of the goods in the mortgage in satisfaction of an unsecured debt due by the mortgagor to him, is not a preference within the meaning of the Assignments Act.

Judgment of MEREDITH, J., reversed.

Statement. THIS was an appeal by the defendant from the judgment of MEREDITH, J.

The following statement of the facts is taken from the judgment of MACLENNAN, J.A.:—

The defendant held a chattel mortgage, dated 6th of February, 1893, on two different stocks of goods belonging to one Giles, in the city of Hamilton. The mortgage was given to secure endorsements made by the defendant for Giles on a composition with his creditors, and also advances in cash and goods to the amount of $4,000 to set him up again in business. The composition notes, dated 1st of February, 1893, were duly made and endorsed at six and eight months, and the defendant advanced to the mortgagor goods to the amount of $4,982.37, and paid accounts at his request to the amount of $673.22, instead of the $4,000 named in the mortgage, an excess of $1,655.59. On the 11th of August the mortgagor was in default, not only for the goods and cash advances, but also for $856.49 of composition notes overdue which the defendant had been obliged to pay, and there were composition notes amounting to $1,454 still current, which would not be due until the 4th of October. On the 11th of August, therefore, the total indebtedness of the mortgagor to the defendant was about $7,970, of which about $6,516 was past due. On that day a sale was made by the defendant, with the concurrence of the mortgagor, of one of the mortgaged stocks, *en bloc*, to one Houston, and the defendant accepted the purchaser's notes for the price at four, five and six months date endorsed by Giles. These notes were

Statement.

accepted by the mortgagee as cash, deducting a discount for the time they had to run, and they amounted, less discount, to $5,640.89. The defendant applied this money generally upon that part of his debt which was overdue, other than the composition notes, and the effect was that thereby his debt, including the $1,655.59, was satisfied and discharged, except the composition notes due and to grow due, amounting to $2,324.20, and a small sum of $14.70, in all $2,338.90. The way the plaintiff puts it in his statement of claim is that the defendant deducted out of the proceeds of the notes the sum of $4,000, being the amount of a certain chattel mortgage on the stock sold to Houston, and for the price of which the notes were given, and applied the balance, or sum of $1,655.59, in payment of a past due and unsecured indebtedness of Giles to him. The plaintiff's counsel also put in as evidence at the trial the defendant's account shewing the application of the purchase notes as cash by him in the manner above mentioned; and there is no doubt that Giles, the debtor, approved of, or acquiesced in, that application of the purchase money. A few days afterwards, that is, on the 17th of August, Giles made an assignment of his estate to the plaintiff for the benefit of his creditors. There is no doubt whatever that on the 11th of August, when the sale of the first stock was made, the debtor was quite insolvent, and the defendant must have been well aware that he was so. The present action was brought on the 11th of June, 1894, and it is for the purpose of recovering from the defendant the sum of $1,655.59, being the unsecured part of the defendant's debt which he satisfied out of the proceeds of the sale of the first stock of goods, and which the plaintiff contends was a fraudulent preference. It seems that just before the assignment was made the defendant had seized the second stock of goods comprised in his mortgage, and was in possession. An execution was also, about the same time, placed in the sheriff's hands against the mortgagor, and the sheriff made a seizure of that stock as belonging to the mortgagor. The assignee having also claimed the

Statement.

goods the sheriff interpleaded. Upon the return of the summons, on the 16th of September, 1893, the plaintiff's claim as assignee was barred, and an issue was directed between the execution creditor and the defendant, which was ultimately tried and decided in favour of the defendant: *Horsfall* v. *Boisseau*, 21 A. R. 663. The goods were sold under the order of the Court, and by order dated the 21st of March, 1894, the defendant was declared to be entitled to receive out of the proceeds the sum of $2,239.54, being the balance still remaining due upon his mortgage.

The action was tried at Toronto, on the 19th of September, 1895, before MEREDITH, J., who gave judgment in the plaintiff's favour for $1,655.59.

The defendant appealed and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th of January, 1896.

Geo. Kappele, and *J. Bicknell*, for the appellant. It is clear that Giles could not have sold the stock without the consent of the appellant, nor could he have prevented the appellant from receiving and retaining the notes which represented the goods so sold. The appellant, therefore, got the notes by virtue of his position as mortgagee and as the price of his joining Giles in passing title to the purchaser, and the transaction lacks every element necessary to establish a preference. The appellant was entitled to apply the proceeds of the notes in satisfaction of his unsecured account: *Griffith* v. *Crocker*, 18 A. R. 370. Assuming, however, that the appellant had no right to appropriate the proceeds in this way, but was bound to apply the whole thereof on his mortgage, then Giles, and afterwards the respondent, would have been entitled to redeem the unsold goods on payment of the remainder of the mortgage debt. But that right of redemption was not exercised. The goods became and were in law the goods of the appellant. The respondent abandoned all right thereto, and was foreclosed by the

order of the Court, and no right of redemption or right to an account could thereafter be exercised by him. In the absence of the exercise of the right of redemption, the appellant was entitled to sell the goods. Any surplus proceeds after payment of the mortgage would be a debt from the appellant to Giles, against which the appellant would have been entitled to set-off the debt due by Giles to him: R. S. O. ch. 124, sec. 23.; *Mason* v. *Macdonald*, 45 U. C. R. 113; *Pile* v. *Pile*, 23 W. R. 440; *Spalding* v. *Thompson*, 26 Beav. 637; *In re Haselfoot's Estate*, L. R. 13 Eq. 327. Argument.

Gibbons, Q.C., for the respondent. That the appellant got a preference in respect of the $1,655.59 is indisputable. He held no security whatever for that portion of his debt, for which he received one hundred cents on the dollar by the transfer to him of the promissory notes in question. The assignment to the respondent was made on the 17th of August, six days afterwards, and Giles, the assignor, had no further assets, while he had large liabilities to other creditors. It is the case, therefore, of a debtor, wholly insolvent, on the eve of his assignment, giving to a creditor what was practically the whole of the assets subject to his control in satisfaction of an unsecured indebtedness. The appellant attempts to meet this plain contravention of the Act by saying that he could have applied the whole of these notes upon his chattel mortgage. The notes were endorsed to him by the insolvent. He did not apply the whole of them upon his chattel mortgage, but elected to look to another stock for the balance of his secured debt. If he had applied the whole proceeds of the first stock upon his chattel mortgage there would have been just the amount now claimed coming to the respondent by way of surplus out of the other stock, after payment of the mortgage in full; he however elected not to apply these notes upon his mortgage, but chose rather to attempt to obtain this preference. The question of set-off does not arise. There can be no set-off under our Act if a preference would thereby be created. The cases in which securities have been set aside in part shew this.

Kappele, in reply.

Judgment.

BURTON, J.A.

March 10th, 1896. BURTON, J.A.:—

I agree in the judgment of my brother Maclennan, and I think the case may be summed up very briefly and resolves itself into the point with which Mr. Gibbons was pressed during the argument: that the very first element to bring the case within the Assignments and Preferences Act is wanting, as that Act deals with a gift or conveyance made with intent to defeat, delay or prejudice creditors, or to give a preference by a debtor in insolvent circumstances. Here the transfer was made at a time when it was not open to objection to secure a debt due to Boisseau, who thereby obtained a perfectly valid title to the goods. The application of the surplus on the first sale may have been one which could not have been sustained on a proper proceeding, but it was not a transfer by the debtor, and so cannot come within the Preferences Act. The application was made by the creditor alone without any act or interference by the debtor.

I think, for the reasons more fully given by my learned brother, that the appeal must be allowed.

OSLER, J.A.:—

The plaintiff fails, in my opinion, to make out anything in the nature of a fraudulent preference within the Act. The defendant's mortgage covered two stocks of goods. One stock was lawfully sold and the notes given for the purchase money came lawfully into his hands. I pass over for the moment the manner in which the proceeds of these notes were appropriated, for if they had all been appropriated on the mortgage they were insufficient to discharge it, and the defendant remained entitled to resort to the other stock and to sell it under his mortgage. When proceeding to do that the mortgagor or the plaintiff might have come in and redeemed, and in that case might have required the defendant to account on the mortgage for the whole of what he had received under the first sale, and

might have taken the second stock on payment of the balance due on the mortgage. He did not take that course, but, on the contrary, suffered the goods to be sold, it matters not whether formally by the sheriff under the execution against the mortgagor, or under the interpleader order, and their proceeds to be paid over to the defendant, into whose hands the whole proceeds of the second stock then lawfully came. In the course of the interpleader proceedings an order was made, which has never been discharged or set aside, barring the plaintiff from all claim to the second stock. Then what has the defendant done? His mortgage debt has, of course, been satisfied and as to the balance in his hands he says to the plaintiff, the assignee of the mortgagor, I have given credit for or applied it upon an unsecured debt which the assignor owed me. This was not done under any agreement or arrangement between himself and the mortgagor and it appears to me that he was doing nothing more than the Act permits him to do: R. S. O. ch. 124, sec. 23. In point of fact the appropriation was made in respect of the proceeds of the sale of the first stock, but that, I think, makes no difference if the defendant was still entitled to sell, and in effect sold, both. The plaintiff can take no higher position than that of claiming the balance of the proceeds of the whole and conceding that in taking that position he is not affected by any order made in the interpleader proceedings, the defendant's right to set-off against the demand for that balance the debt due to him by the insolvent is preserved by the section I have referred to "in the same manner and to the same extent as if the assignor were plaintiff." There was neither gift, conveyance, assignment or transfer of anything with intent to defeat, hinder, delay, or prejudice creditors of the assignor within the meaning of the Act, nor anything in the shape of an agreement between the defendant and the assignor that the moneys received under the mortgage should be appropriated in any particular way or applied upon any unsecured debt. Had anything of that kind been proved there might have been

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OSLER, J.A.

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OSLER, J.A.

room to argue that the claim for set-off came within the exception mentioned in section 23. As it is, I think the appeal should be allowed.

MACLENNAN, J.A.:—

At the outset the plaintiff seems to be met with a serious difficulty. The money sought to be recovered is part of the proceeds of the mortgaged goods. The defendant's title to the goods is not and could not be disputed. If he had a good title to the goods it follows that he had the same title to the money received for them. The title being a mortgage title, if he received more than his claim he would be accountable for the surplus; but it is admitted that in any view the proceeds of the sale of the first stock was at least $700 or $800 less than the sum secured by the mortgage. The defendant, therefore, had a title to the whole sum of $5,640.89 which he received. It is said, however, that he applied $1,655 of it to an unsecured debt and not upon his mortgage. But if he had a right to keep the money it seems not to be material what he did with it. If, as is admitted, there was still a sum of $2,839.54 due upon the mortgage, of which $800 was past due, and $1,454 in the form of endorsements upon notes not maturing until October, it is plain that neither the mortgagor nor the plaintiff could have recovered the $1,655 from the defendant on the ground that he had applied it on his unsecured debt or on any other ground whatever. The only thing either of them could have done was to redeem the goods still remaining unsold, and to compel the defendant to apply the $1,655 strictly upon the mortgage debt. If the plaintiff had brought a suit for redemption before the goods were sold under the interpleader, it may be that the defendant's application of the $1,655 could not have been maintained, as to which, however, it is not necessary to express an opinion, and if it could not, then the defendant would have gained no preference over the other creditors as to his unsecured debt. He could not have

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MACLENNAN, J.A.

tacked it to his mortgage debt as against the assignee offering to redeem: Fisher's Law of Mortgage, 4th ed., p. 572; Coote's Law of Mortgage, 5th ed., pp. 881, 900; *Ford* v. *Allen*, 15 Gr. 565; *Ferguson* v. *Frontenac*, 21 Gr. 189; *Howeren* v. *Bradburn*, 22 Gr. 96; and see *Talbot* v. *Frere*, 9 Ch. D. 568.

But the assignee did not take that course; he made no offer to redeem. He made a claim to the goods, and his claim was barred by the order of the Court. He did not appeal against that order and it is now binding on him. He stood by and allowed the question of title to be fought out between the mortgagee and the execution creditors, with the result that the mortgagee has received under the order of the Court full payment of the remainder of his debt, on the footing that the sum of $1,655 was lawfully applied in payment of the unsecured part of his debt. It is after all this has taken place that the present action is brought. The balance of the proceeds of the mortgaged goods was paid out to the defendant under order dated the 21st of March, 1894, and the present action was brought on the 11th of June afterwards. The money in question was part of the proceeds of goods sold under a valid mortgage. It came lawfully and honestly into the hands of the defendant, and not by any gift, conveyance, assignment or transfer by the mortgagor with the intent or effect of a preference such as is declared to be illegal by the Assignments and Preferences Act, and except in and by a redemption suit I am unable to see how the defendant could have been prevented from applying it on his unsecured debt, or how any part of it could be taken out of his hands as long as anything was due to him either on his mortgage or otherwise. While the second stock of goods was still unsold, and even after they were sold and while the proceeds were still in Court, the plaintiff might have insisted on the mortgage account being taken, and on having the sum in question applied on the mortgage debt; for the money in Court represented the mortgaged goods, and the defendant could have no larger claim to the money in Court than to the goods themselves. But the

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MACLENNAN, J.A.

plaintiff did not do that; he allowed his claim to the goods to be barred, and he allowed the proceeds to be paid to the defendant, and in my judgment, under those circumstances, his claim is lost.

I am, therefore, of opinion that the judgment of my brother Meredith is wrong and ought to be reversed and that the action should be dismissed.

HAGARTY, C.J.O :—

I agree.

Appeal allowed.

GARLAND v. CITY OF TORONTO.

Master and Servant—Workmen's Compensation for Injuries Act, 1892—"Superintendence"—55 Vict. ch. 30, sec. 2, sub-sec. 1 (O.).

No implied right of superintendence within the meaning of section 2 (1) of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. ch. 30 (O.), arises merely from length of service or skill, and the employer is not liable where one workman, presuming on greater length of service or skill, directs his fellow workman to do certain work in an unsafe manner and injury results.

Judgment of the Chancery Division, 27 O. R. 154, reversed.

Statement.

THIS was an appeal by the defendants from the judgment of the Chancery Division, reported 27 O. R. 154.

The defendant was employed as a day labourer in connection with the erection of the court house in the city of Toronto, and brought the action under the Workmen's Compensation for Injuries Act, to recover damages for an injury sustained by him while so employed. His complaint was, as set out in his statement of claim, that on the 20th of September, 1893, he was engaged under the superintendence of one Amory, in lifting, by means of a derrick, stone intended to be used in the construction of the building, on to waggons for the purpose of being taken to the stone masons to be dressed; that the method employed

for raising the stone was by means of a chain suspended from the end of a boom of the derrick, to the lower end of this chain another chain being fastened to which were attached two hooks called "dogs," the points of the dogs being inserted in holes at each end of the block of stone; that a large block of stone, while being raised in this way, broke away from the dogs and fell on the plaintiff's foot, crushing it and seriously injuring him; that the stone was too heavy to be raised in this manner and should have been tied with chains; that Amory ordered the stone to be lifted in this improper manner, and that the plaintiff was bound to obey his orders; and that Amory in so acting was carrying out the instructions of one Marshall, the head stone cutter; that the derrick was improperly constructed in that the mast thereof was not upright, but leaned several inches to the north, causing the boom with the stone to swing in that direction so that the plaintiff was obliged to pull the stone with a rope, and when the dogs gave way, was pulled under the stone before he could let the rope go. Statement.

The action came on for trial before STREET, J., who non-suited the plaintiff on the ground that the city were not his employers, but this judgment was set aside and a new trial was ordered.

The action came on again for trial at Toronto, before MEREDITH, J., when the plaintiff was again non-suited on the ground that Amory was not entitled to exercise any superintendence over him.

Upon appeal to the Chancery Division (BOYD, C., and ROBERTSON, J.), this non-suit was also set aside and a new trial was ordered,

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 29th and 30th of January, 1896.

Fullerton, Q. C., for the appellants. There is no evidence that any orders were given by any person having

Argument.

any authority to give them. Amory was a fellow-workman, and he could not merely by virtue of his greater length of service or greater knowledge, assume to give orders to the plaintiff, and thus throw upon the defendants a liability that they never intended to assume: *Howard* v. *Bennett*, 58 L. J. Q. B. 129; *Wild* v. *Waygood*, [1892] 1 Q. B. 783; *Millward* v. *Midland R. W. Co.*, 14 Q. B. D. 68; *Kellard* v. *Rooke*, 19 Q. B. D. 585.

W. J. Clarke, for the respondent. There was sufficient evidence to justify the inference that what was done was done under Marshall's orders, who was admittedly a person having authority to give directions as to the mode in which work of this kind should be done. Even if, however, the evidence is not sufficient to justify that inference, there is no doubt whatever that Amory ordered the stone to be lifted in this improper way; and he by virtue of his seniority, was entitled to give orders, and his orders having been obeyed to the plaintiff's injury, the defendants are liable: *Dolan* v. *Anderson*, 12 Ct. of Sess. Cas., 4th series, 804; *McManus* v. *Hay*, 9 Ct. of Sess. Cas., 4th series, 425; *Stanton* v. *Scrutton*, 62 L. J. Q. B. 405.

Fullerton, Q. C., in reply.

March 10th, 1896. HAGARTY, C.J.O.:—

Two labouring men, each paid the same wages, are working at a derrick, used for moving stones prepared for the building of the court house. One has been much longer at this work than the other.

The elder man, Amory, says he was running the steam derrick—he supposed he was in charge of it. There was a Mr. Marshall, a foreman of the stone cutting, who gave orders to move a stone to another place. The plaintiff and Amory and a small boy of ten years old were at the derrick. The foreman did not give any order how to move the stone, whether by chains or dogs, or grabs as they call them. The foreman then apparently went away. Amory said to plaintiff we have to lift that stone—they proceeded

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HAGARTY, C.J.O.

to put on the dogs, or hooks, to the cuts in the stone and in lifting it the dogs, or hooks, burst away from the holes, the stone fell and the plaintiff was injured. Amory said he had lifted hundreds of stones that way, and the quarrymen seldom used the chains.

Evidence was given that for a stone of that weight chains should have been used as the safer plan. No direction was given by the foreman as to which plan should have been adopted.

The plaintiff's claim rests altogether on Amory's being in such a position that he was bound to obey his order.

Amory is asked: "You say you were the oldest man at the derrick, you mean you were the first man at the derrick?" "Yes."

"That is the only reason you have for thinking you were the boss there?" "That is all."

"Did you ever consider yourself a foreman?" "No. If I was a foreman I would want a little extra money."

In the plaintiff's evidence, he speaks of Amory as "in charge."

He is asked, "Did any one tell you he was in charge?" "The foreman Denison told me to go and help Amory."

"Did any one tell you to do as he told you." "Not as I know for."

The words of the Act are, "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed."

The preceding section may be read in connection with this as to the negligence of any person who has superintendence entrusted to him. By the amending Act of 1889, this superintendence is to be construed as meaning such general superintendence over workmen as is exercised by a foreman or persons in a like position as a foreman, whether ordinarily engaged in manual labour or not.

In the absence of some express authoritative decision to the contrary, I am wholly unable to see that, on the facts before us, there was a case to be submitted to the jury.

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HAGARTY, C.J.O.

Does this case fall within the Act; was the injury sustained by plaintiff while in performance of an order given by a person to whose orders or directions he was bound to conform?

On the contrary, this appears to me as simply the case of two labouring men told to do a certain piece of work, but not as to how they were to do it, electing by the advice of one or other of them to do it in what turned out to be an unsafe manner; in effect an injury sustained in the course of a common employment from having selected the unsafe instead of the safer method.

If three or four labourers were told by their foreman to do a certain work, and proceed to do it, and one, a somewhat more experienced workman than the rest, suggests a course which they all adopt, and injury results to one, does such adoption render the employer liable?

An illustration is given in Ruegg on the Employers Liability Act, 2nd ed., p. 83: "A number of labourers unloading bricks by throwing them from one to another, often direct one another when to throw or stop throwing them. If injury resulted from obedience to such a direction as this, it would be almost absurd to say that it resulted from any order or direction to which the workman was bound to conform. In *Howard* v. *Bennett*, 58 L. J. Q. B. 129, Lord Coleridge holds that communication between workmen did not come within the statute and that to hold otherwise would be enormously to increase the liabilities of employers—that the person to give directions, must be in a position of superiority, giving directions that the person injured was bound to follow.

On a ruling on a subsequent branch of the case, he is widely differed from by the Court of Appeal in *Wild* v. *Waygood*, [1892] 1 Q. B. 783, by Lord Herschell, and Lindley, and Kay, L.JJ. In this last case there seems no doubt that the person injured was expressly sent to help another man who was arranging and constructing a lift, whose orders he was bound to follow.

The very late case in the Lords of *McCord* v. *Cam-*

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HAGARTY, C.J.O.

mell, [1896] A. C. 57, turned upon the section as to a a person in charge of an engine on a railway.

I cannot see what evidence there was to go to the jury as to Marshall's having any knowledge of the way the stone was to be lifted. It seems a mere surmise not warranted by evidence. The learned trial Judge said there was not a tittle of evidence to shew that Marshall did anything that was negligent, that there was nothing to shew that he knew that the quarrymen had made the holes, nothing but his simple order to move the stone, and that it was impossible to say that there was negligence on his part in doing that. It was for the purpose of being cut in two by the quarrymen that the direction was given to move it over. Proper chains were there to lift if required. The plaintiff himself discussed with Amory how they should lift the stone, asking if it might not be dangerous, to which Amory replied that they would lift it with the dogs. I think, with respect, that in the Divisional Court the case was treated as if there were evidence in favour of the plaintiff which I am wholly unable to discover. There may be ground for some surmise, especially as to Marshall's intervention, but I cannot see that it deserves any higher character. We would have to go back to the old ideas of the sufficiency even of a scintilla of evidence to support a finding for the plaintiff.

The often quoted words of Williams, J.: "It is not enough to say that there was some evidence; a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence on which they might reasonably and properly conclude that there was negligence:" *Toomey* v. *Brighton and South Coast R. W. Co.*, 3 C. B. N. S. 146, which Lord Bramwell says he adopts in *Cornman* v. *Eastern Counties R. W. Co.*, 4 H. & N. 781. It was also adopted in *Blackman* v. *London, Brighton and South Coast R. W. Co.*, 17 W. R. 769; and see Beven's Law of Negligence, p. 665: *Lovegrove* v. *Brighton and South Coast R. W. Co.*, 16 C. B.

Judgment.

HAGARTY, C.J.O.

N. S. 691, per Willes, J.; *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; *Giblin* v. *McMullen*, L. R. 2 P. C., at p. 335.

Regret for an injury such as the plaintiff has sustained may be strongly felt, but we must try to avoid imposing further liabilities on employers of labour than the stringent penalties enacted by the Legislature. I cannot see what the defendants here have been shewn to have done to make them responsible for this unfortunate accident.

BURTON, J.A.:—

This was an action under the Workmen's Compensation for Injuries Act.

The plaintiff originally based his claim to recover on the ground that he was merely carrying out the orders of one Amory, to whose orders and directions he was bound to conform.

During the trial he obtained an amendment alleging "that Amory in his turn was under the direction of one Alexander Marshall, in the employ of the defendants on the said building, and who gave directions that the stone should be raised in a particular manner."

The amendment brings to one's recollection the nursery legend of the house that Jack built, and carried to its logical conclusion would convert the Act into one of which the title should be an Act to make employers liable for any accident or injury to their workmen however caused.

Another amendment was also made alleging "that another act of negligence, which contributed to the accident, was the improper construction of the derrick, inasmuch as it was somewhat out of plumb and leaned to the north."

And "that the system of lifting the stone by dogs instead of using chains was a dangerous and negligent system established by the defendants, or which they negligently permitted to be established and used in connection with the work."

At the close of the plaintiff's case, the learned trial

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Judge was called upon to decide the preliminary question whether any facts had been established by evidence from which negligence might reasonably be inferred. If he had decided that point in the plaintiff's favour, it would have been the function of the jury to decide whether it ought to be inferred, and we have the high authority of Lord Cairns for the opinion that it is of the greatest importance in the administration of justice that these separate functions should be maintained and should be maintained distinct.

The learned Judge was called upon to discharge this delicate and important function and he dealt with each clause *seriatim*.

First, as to the defect in the derrick, he intimates that counsel had admitted in his argument that he could not recover on that branch of his claim, and that it was very plain that he could not, and as that ruling is not reversed by the Divisional Court it is unnecessary to consider it further, but I entirely agree with the trial Judge and his reasons.

He then deals with the question of whether the injury was caused by the negligence of Amory, being a person in the service of the employer who had any superintendence entrusted to him, or a person in charge of the work whose order or directions the plaintiff was bound to obey.

The learned Judge held, and I think held correctly, that there was no evidence to go to them that Amory filled either of those positions.

Amory had stated all the facts, and upon these facts it was the duty of the Judge to decide whether he came within the Act, and it clearly was not a question to submit to a jury.

No doubt the way in which the stone was handled was improper, but the learned Chancellor is mistaken when he says, that "the plaintiff did not know that it was dangerous." On the contrary, the plaintiff himself pointed out to Amory that he did not think it was safe to raise the stone with dogs.

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In an action of this kind the onus is upon the plaintiff to shew what the negligent man's duties were. A mere statement by the man himself, that he had charge, or that the plaintiff was bound to conform to his orders, is not evidence, but he must shew the facts from which he draws that conclusion, and it then becomes the duty of the Judge to determine whether there is any evidence that he had such superintendence and control as to make his orders imperative.

That he and the plaintiff also were, according to the evidence, guilty of negligence, admits of no question; but whether Amory was a person to whose orders or directions the plaintiff was bound to conform does not appear to me to be established; it is a mere matter of law, and upon this point I make an extract from a judgment of the present Lord Esher, which I think fully sustains the learned trial Judge's conclusion upon this part of the case: (*Gibbs* v. *Great Western R. W. Co.*, 12 Q. B. D. 208, at p. 211).

"Now the Act of Parliament has not made employers liable to any one of their workmen for the negligence of all his fellow-workmen, but only for the negligence of some of them, and the question is, whether Fisher is one of those for whose negligence the employers are liable to one of Fisher's fellow-workmen. This Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the Court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and, therefore as largely as reason enables one to construe it in their favour and for the furtherance of the object of the Act. But even taking that into account, the burden of proof in such a case as this is upon the plaintiffs to shew that the negligence was that of a fellow-workman, for whose negligence the employers are made liable by the statute."

It lay, therefore, on the plaintiff to shew that Amory was a person to whose orders he was bound to conform.

It is true that he swears (although in his previous exami-

nation he gave a different statement), that he believed that Amory was a person to whose orders he was bound to conform, but to act upon such evidence would be to make him the judge of the law and not the witness of facts, and the same remark applies to Amory's evidence. He does not shew that he had any superintendence entrusted to him, or that he was a foreman or other person in authority, but merely that he was the senior workman, and so assumed to give orders, but does not pretend that any such practice was known to or sanctioned by his employers or any one having authority to allow it.

I do not contest at all that although a person engaged in manual labour, he might not under our Act be a superintendent or person coming within sub-section 2 of section 3, but I say there was no evidence to shew that he filled any other position than that of an ordinary fellow-workman.

The plaintiff's counsel were evidently impressed with this difficulty when they asked the amendment; and it is well to refer to the actual language of that amendment. The original statement of claim having alleged that it was the duty of the plaintiff to aid in the work under the instruction and superintendence of Amory, proceeds: "who in his turn was under the direction of one Alexander Marshall in the employ of the defendants, and who gave directions that the stone should be raised in the manner hereinafter set out;" meaning, I assume, that it should be raised by the use of dogs instead of by chains.

There is no allegation that Amory was bound to obey Marshall's orders, and it will be seen in a moment upon what a slender foundation the plaintiff builds up a theory that Marshall gave orders to raise the stone by dogs. It is not pretended that he gave any such order expressly: all that he directed was to remove that stone, and the plaintiff was not present when that direction was given.

It is said that Marshall must have seen the holes made in the stone prepared for the use of dogs, but there is no evidence that he did see them or that he had ever seen

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any of this kind of stone raised in that way. On the contrary, the plaintiff and Amory both swear that no such stone was ever, with this exception, raised in that way, and Marshall had left before the dogs were used.

It was, of course, incumbent upon the plaintiff to shew negligence in Marshall if his order is relied on, and the learned trial Judge, in withdrawing the case from the jury, intimated that if there had been any evidence of negligence on the part of Marshall, he thought there would have been a case to submit to them; but, he says, when a foreman directs a workman to remove a stone he means to remove it in a proper manner.

When we refer to the interpretation clause we find that superintendence shall be construed as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman, whether the person is or is not ordinarily engaged in manual labor.

Negligence under this Act must be proved, and when the evidence is equally consistent with the existence and non-existence of negligence, it is not competent to the Judge to leave the case to the jury: see *Harris* v. *Tinn*, 5 Times L. R. 221.

It was incumbent upon the plaintiff in this case, to prove that Amory filled a different position from that of a common labourer; that he had been entrusted by his employer, or someone in authority, with the duty of superintendence, and that he occupied such a position that the plaintiff was bound to conform to his orders. Marshall gave no orders except to move the stone, and there is no evidence that he knew of the holes alleged to have been made for the dogs, and that direction was given to Amory alone and not to the plaintiff, so that, as negligence had to be proved affirmatively, the learned Judge was right in withdrawing the case from the jury.

I have referred to the cases referred to by the Chancellor and do not think they sustain the position that in this case there was any evidence that the plaintiff was bound to obey the orders of Amory. *Millward* v. *Midland*

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BURTON, J.A.

R. *W. Co.*, 14 Q. B. D. 68, stands upon its own facts. The plaintiff was a boy employed to go with a carman for the purpose of unloading goods. The carman was in charge of the car and the only person, and he gave the orders, and it was shewn that the plaintiff was doing what in the ordinary course of business he did in unloading similar goods.

In the recent case of *Wild* v. *Waygood*, [1892] 1 Q. B. 783, the person giving the orders was a foreman and the main contest there was whether the particular injury sustained was the result of that order.

I think, with great respect, that there was no question here which should have been left to the jury. The plaintiff has my sincere sympathy, but it would be carrying the liability of employers to an unjust and unreasonable point if, in the absence of any personal negligence, the defendants were made liable for the negligence of these two fellow workmen.

OSLER, and MACLENNAN, JJ.A., concurred.

Appeal allowed.

In re Canadian Pacific Railway Company and City of Toronto.

Municipal Corporations—Railway Company—Joint Special Agreement—Local Improvements.

A city municipality and a railway company and others, entered into an agreement for the execution of certain works, by the former, authorized by order in council under the Railway Act, the cost being apportioned between them, of which the railway company paid their share.

The agreement provided that no party to it should be entitled to compensation for injury or damages to their lands by reason of the construction or maintenance of the works, a necessary part of which was the construction of a road towards and under the railway tracks. A portion of the roadway fronted on the lands of the railway company, and the city sought to charge the railway company with the cost of the construction of the roadway as a local improvement under the Consolidated Municipal Act, 1892, and passed a by-law for that purpose :—

Held, that the work having been done under the agreement between the parties and the order in council, the local improvement clauses were not applicable and the by-law was void.

Judgment of MacMahon, J., affirmed.

Statement. This was an appeal by the city of Toronto from the judgment of MacMahon, J., delivered on the 24th of July, 1895, quashing by-laws 3244, 3245, and 3246, and was argued before Hagarty, C.J.O., Burton, Osler, and Maclennan, JJ.A., on the 30th and 31st of January, 1896.

The facts and arguments appear in the judgment of the Court.

Fullerton, Q.C., and *T. Caswell*, for the appellants.

Armour, Q.C., and *A. MacMurchy*, for the respondents.

March 10th, 1896. The judgment of the Court was delivered by

Osler, J.A. :—

These by-laws were passed in connection with the work known as the King street subway. No. 3244 was for the construction of a sewer, No. 3246 for the construction of a plank sidewalk, and No. 3245 for the construction of a scoria and tamarac block roadway on King street, between the east limit of the King street subway and

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Dufferin street. On the argument the appeal was abandoned as to the sewer and sidewalk by-laws and confined entirely to so much of the judgment as dealt with the roadway by-law, No. 3245. Broadly stated, the contention on the part of the city is that the whole work was a mere local improvement, the cost of which was chargeable to the frontagers by force of the city by-law providing that all works of that description should be executed and charged for as local improvements under the local improvement clauses of the Municipal Act. The railway company, on the other hand, contend that the work being a part of the works connected with the construction of the subway, and a necessary part of the subway and works, no part of the cost can be directly thrown upon them as for a local improvement. The construction of these works became necessary, it is said, in consequence of an agreement between the city and the several railway companies interested, and of an order in council passed under section 74 of the Railway Act, R. S. C. 109, and to a work so done the local improvement clauses of the Municipal Act are, it is argued, inapplicable.

For some years previous to 1887 it had become evident that the great danger to the public caused by the level railway crossings on King street west would by some means have to be especially provided against, and on the 21st of October of that year an agreement was made between the several railway companies and others interested and the city of Toronto, reciting that in the interest of public safety it was necessary that the railway tracks should be altered, etc., and that certain of the tracks should be removed from their then location and placed elsewhere, "thereby bringing the several railway tracks crossing King street west together as closely as possible and facilitating the crossing of the same by an overhead bridge or a subway or other improved crossing." The agreement then went on to provide for carrying out that preliminary by means of mutual conveyances of the necessary lands, and the city and the Canadian Pacific Railway thereby con-

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sented and agreed to the removal and readjustment of the railway tracks and other works upon and in King street west as provided in the first clause of the agreement.

It was then agreed that "in the event of the alteration of the railway crossing upon or on King street, at any time or times hereafter, under or pursuant to any order or orders in council made on report of the Railway Committee of the Privy Council of Canada, and whether such alteration shall consist of a level crossing and the erection and maintenance of a gate and guards, or of the construction of an overhead bridge upon, over and along, or a subway upon, in and under King street aforesaid and the necessary works connected therewith," no one of the said several parties should be entitled to claim compensation for injury or damages which might be done to or suffered by them in respect of their lands or other property by reason of the construction, making or maintenance of any such changes, alterations or improvements.

On the 28th of November following, a report of the Railway Committee of the Privy Council was approved by the Governor-General setting forth that the council had had under consideration a report from the railway committee with reference to certain representations of the city council of Toronto and others with regard to the dangerous character of the present level railway crossings of King street west, and that, after hearing the parties interested at a meeting called for the purpose, when a proposition was made on the part of the city council to construct the necessary works for carrying the street under the railway tracks provided the railway companies paid a fair proportion of the cost, the railway committee deemed it necessary for the public safety, and recommended, that the corporation of the city of Toronto be authorized and required to carry the said street under the tracks of the said railway companies by a bridge and subway with necessary approaches, and to execute all works required to that end, said bridge and subway to be built in accordance with

plans and specifications to be prepared by the corporation and approved by the Minister of Canals and Railways, etc.

The report then proceeds to apportion the cost of the work: so much to be paid by each railway company; so much by the municipality of Parkdale; and the city of Toronto to contribute the sum of $80,000, or such other sum in excess of or below the estimate of the cost of the works (deducting the payments made by other parties) as should cover the whole expenditure on the works. It was further recommended with respect to the maintenance and repair of the said bridge, subway and approaches that the city of Toronto be required to maintain and repair the masonry work and all work appertaining to the public roadway and sidewalks.

In the course of the next few years following the passage of the order in council the bridge and subway and approaches were constructed by the city, and the respondents duly paid their share of the cost thereof.

The roadway, for the cost of the construction of part of which they are assessed, commences at Dufferin street and runs east on King street a distance of 2,896 feet to the easterly limit of the east incline of the subway. On the north side of King street a frontage of 449 feet of the respondents' property is assessed, of which all but 157 feet is on the incline or approach of the subway, King street being for that distance lowered by excavation for the purpose of the subway in front of their property. Going further east it is, of course, lowered much more, until at the extreme west end of the subway itself the excavation reaches a depth of seventeen feet, but here the respondents' property has not been assessed.

It was sworn and not denied that the roadway is a part of the works which the city was required to execute under the order in council, and without which the subway and approach would be incomplete, and it seems to me immaterial whether or not there had in fact been a pavement on that part of the street occupied with the approach before its excavation for that purpose. Without a pave-

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ment of some kind the approach and subway would become a mere impassable ditch, and a pavement would be a necessary part of the construction of the approach. Whether or not this point could have been made more clear by the production of the original plans and specifications we cannot tell, as neither party furnishes any precise information as to them.

The appellants' case, as put in their third reason of appeal, substantially is, that as the order in council authorizing the construction of the subway and apportioning the cost does not provide that their share of the cost should be raised in any particular way, they were at liberty to raise the money in any of the special modes by which they can do so under the Municipal Act, and, therefore, so far as any of the works to be done in connection with the subway come under section 612 of the Act as being of the character of local improvements, they are, by their own by-law passed under section 625, bound to assess back the cost of the same on the property benefited.

With this contention I am unable to agree. The answer to it is that the work, so far as it was executed as being part of the work in connection with the subway, was done under the agreement between the city and the railway companies and the order in council which the city had bound itself to obey. To that extent it was a work outside the scope of the local improvement clauses of the Municipal Act, and was not in fact undertaken under those clauses. The right or duty of the appellants to execute the work did not depend upon their giving notice of their intention to initiate it as a local improvement, or their compliance with the provisions of sections 617 and 619 of the Act. It was done as a matter of agreement between all parties sanctioned by the order in council. One part of the whole work cannot be dissociated from the rest. Had the subway and approaches not been excavated the pavement might have been made as a local improvement and the cost assessed against the frontagers, but then their property would not have been injuriously affected by

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the lowering of the road. As it stands now, it has been injuriously affected by that very means, and although the respondents have agreed to make no claim for compensation in respect of it as being work done in connection with the subway, the appellants seek to impose upon them a greater proportion of the cost of the works than by the order in council they were bound to pay, by assessing them for another part of the work done under the agreement as if it had been done as a mere local improvement. The whole work was done as a piece of general city work, and the city's share of the cost must be borne out of the general taxes, to which, of course, the respondents contribute in common with other ratepayers, but not by special assessment of the cost as a frontage rate on their property. If this could be done the city would simply be enabled to throw upon the respondents a great part of the cost of the work from which by their own agreement with them they had been relieved. For these reasons it appears to me that the by-law is bad and that my learned brother MacMahon's judgment quashing it should be affirmed.

Appeal dismissed.

ITTER v. HOWE.

Church—Trust—Alteration in Constitution—Change in Doctrine—Secession of Members.

The civil Courts will deal with questions of church doctrine and beliefs only in so far as it becomes necessary so to do to determine civil rights. Where a dispute arises as to which of two bodies represents a particular church in trust for which property has been granted a question of ecclesiastical identity arises, and those who claim that the trust has been violated must shew that their opponents have so far departed from the fundamental principles of the church in question as to be in effect no longer members thereof.

A provision that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands" is not violated by mere alterations in expression or fuller and clearer statements of doctrine.

Where the constitution of a church provides that there shall be no alteration therein "unless by request of two-thirds of the whole society," alterations initiated by the governing body and assented to at a regularly constituted general conference of the whole church and by two-thirds of those of the members who have voted thereon, all members having been asked to vote, are valid. No previous request is necessary, nor is it necessary to have the assent of two-thirds of all the members.

Judgment of STREET, J., reversed.

Statement. THIS was an appeal by the defendants from the judgment of STREET, J.

The plaintiffs brought the action asking that they might be declared to be the trustees of a body known as the "United Brethren in Christ," and that possession might be given to them as such trustees of a piece of land in Port Elgin, and of the church thereon erected.

Their claim was thus stated in their statement of claim:—

In the year 1863 and for many years previously and thereafter continuously down to the present time, there has existed a religious organization in the United States of America and in Canada known as "The Church of the United Brethren in Christ," having official bodies for the government of the church, its members, congregations, and officers, each being clothed with certain powers, as follows: First, the official board of each congregation, which meets monthly and transacts the business of the congregation, and which consists of the recognized preachers, exhorters,

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leaders, stewards, trustees, and Sunday-school superintendents who reside within the bounds of the congregation, or hold membership therein. Second, the quarterly conference, composed of the presiding elder of the district, and the preacher in charge of the circuit or station, and recognized preachers, exhorters, class leaders and stewards, trustees, and Sunday-school superintendents who reside within the circuit, or hold membership therein. It meets quarterly, and, among other powers and duties, is clothed with the duty of appointing trustees of the meeting houses or church properties within the bounds of the circuit, which trustees hold office during the pleasure of the quarterly conference. Third, the annual conference, which meets yearly, and is composed of the elders and licentiate preachers who have been received by the annual conference in each district, and is presided over by a bishop of the church. Fourth, the general conference, which meets every four years, and is composed of elders elected by the church members in every conference district throughout the church. The official board is subordinate to the quarterly conference, the quarterly conference to the annual conference, and the annual conference to the general conference, the last being the highest legislative and judicial body of the said church.

The church has a printed constitution and rules and regulations for the government of the church, which are together known as the "Discipline of the Church."

On the 9th day of May, 1889, a general conference of the church, composed of delegates duly and regularly elected under the laws, rules, and regulations of the church, met at the city of York, in the State of Pennsylvania, at which meeting 130 delegates were present.

On the 13th day of May, 1889, in consequence of their dissatisfaction with a certain vote of the general conference, fifteen of the members thereof withdrew from the general conference and met in a body in another building in the city of York, and adopted a resolution to the effect that inasmuch as 110 of the delegates and members of the

Statement. general conference did on May 11th, 1889, vote to adopt a new constitution and confession of faith, and did, on the 13th day of May, 1889, through the presiding bishop, declare the same in force, thereby forming a new church, therefore they were declared to have thereby vacated their seats as members of the general conference of the church of the United Brethren in Christ.

After the withdrawal of the fifteen members, the general conference continued in session until the 21st of May, 1889, when it adjourned *sine die*, after adopting a resolution reciting that whereas certain delegates (naming them) had actively participated in the proceedings of the said general conference from its organization to the close of its third day's session, and had then vacated their seats and joined in the formation of another church organization outside of and separate and apart from the place properly and officially occupied by the lawfully elected general conference of the said church, that therefore the said persons were declared as having irregularly withdrawn from the said general conference and the said church, and were, in view of these facts, no longer ministers or members of the church of the United Brethren in Christ.

The said general conference also passed certain resolutions providing for the mode of dealing with persons insubordinate to the said general conference, and refusing to obey the order and discipline of the said church as provided by the general conference thereof, such resolutions being set out at length in the discipline of the said general conference known as "The Discipline of 1889."

In the year 1863, by deed bearing date the 28th day of November, 1863, certain lands in the village of Port Elgin, in the county of Bruce, * * were conveyed to certain persons therein named 'as trustees for the 'church of the United Brethren in Christ,' the grant being 'unto the parties of the third part and their successors in office, in trust for the church of the United Brethren in Christ, to erect and build or cause to be built a house of worship for the members of the said church,' and the habendum

being 'unto the said parties of the third part and their successors in office forever.' Statement.

Shortly after the date of the said deed a church edifice was erected upon the said parcel of land and remains there up to the present, and up to the year 1880 the church continued to be used as a place of worship by the members of the church of the United Brethren.

[Proceedings taken for the appointment of new trustees from time to time were then set out, ending with the appointment in March, 1889, of the defendants as trustees, and for the appointment of a presiding elder and minister in October, 1889. The statement of claim then proceeded:]

The defendants, sympathizing with the said fifteen insubordinate members of the general conference, refused to acknowledge the authority of the said presiding elder and minister or preacher, and refused to allow them to conduct religious service in the said church at Port Elgin, and accordingly, at a meeting of the quarterly conference of the Port Elgin circuit, held on the 8th day of March, 1890, it was resolved that the plaintiffs, John Itter and Archibald Pollock, and one Alexander Patterson, should be the trustees of the Port Elgin church, to fill the places made vacant by the irregular withdrawal of the old board from the said church.

Subsequently, at a meeting of the said quarterly conference, held on the 14th day of September, 1891, the plaintiffs, John Itter, John Hyde, and Archibald Pollock, were appointed trustees of the said Port Elgin church, and they continued to be such trustees, and are now the duly elected and constituted trustees of the said church and premises at Port Elgin aforesaid in trust for the church of the United Brethren in Christ.

The position of the defendants was thus stated in their statement of defence:—

The premises in question were, from the year 1863, and now are, held "for the church of the United Brethren in

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Christ," as "a house of worship for the members of the said church," and have been constantly used for the said purpose, and for no other use or purpose, and the defendants have no thought or intention of diverting in any way the said premises from the above mentioned trust on which they were accepted, and have been since and are now held.

Almost the whole of the members of the body called the "Church of the United Brethren in Christ" continue to worship regularly, each week, in the said church, and they compose, in fact, the church of the United Brethren in Christ at Port Elgin, who purchased and paid for said premises, and erected thereon the edifice, at their own cost, in which the services of the said church are so regularly held.

At the time of such purchase and of the erection of the said church there was a well-defined constitution which governed the said church, and a confession of faith which laid down clearly the doctrine and teachings of the said church which constituted the church in question and under which it continued to act and is now acting.

Certain dissatisfied members of the said church recently met in the United States of America, and without authority pretended to pass certain rules and regulations whereby they attempted to vary in material matters both the said constitution and the said confession of faith, and acting under such altered constitution and confession have been proceeding to endeavour to obtain the property of the church of the United Brethren in Christ for themselves.

By one of the clauses of the constitution under which the defendants hold the premises in question, the said constitution is declared to be unchangeable, and for this reason alone it is submitted that all the proceedings taken in respect of the variation of the constitution are wholly void.

Even if there were the power to alter the said constitution, yet the proceedings taken to accomplish the change therein were wholly irregular, and the pretended constitu-

tion under which the plaintiffs pretend to act, and under which alone they can make the claim put forward by them, is totally invalid for this reason. Statement.

The defendants submit that any resolution or proceedings taken in the United States of America in respect of the property in question cannot affect real property situate within this Province.

There are over forty congregations or churches belonging to the United Brethren in Christ within the Province of Ontario, which have buildings vested in trustees used for the purposes of worship.

The defendants submit that the plaintiffs are not entitled to sue, and have not made out any case entitling them to relief; and that if any proceedings could be taken in respect of the matters in question, they should be so taken by information at the suit of the Attorney-General.

The proceedings taken by the general conference, in regard to which the dispute arose, are stated in the judgment of MACLENNAN, J.A.

The changes in doctrine complained of were, shortly speaking, the following: In the old confession of faith belief was expressed in "the resurrection of the body;" "the holy Christian church, the communion of saints;" "the life everlasting;" and "the fall in Adam." In the new confession the expressions were "the resurrection of the dead;" "the holy Christian church composed of true believers;" "an eternal state of rewards in which the righteous dwell in endless life and the wicked in endless punishment;" and "that man is fallen from original righteousness, and, apart from the grace of our Lord Jesus Christ, is not only destitute of holiness, but is inclined to evil and only evil and that continually."

In the old confession the "ordinances" of baptism and the Lord's Supper were spoken of; in the new the "sacraments."

The changes in the constitution are referred to in the judgments.

Statement. The action was tried at Toronto on the 16th and 17th of October, 1894, before STREET, J., who at the close of the case gave judgment as follows in the defendants' favour:—

"It seems to me that the case is quite a plain case upon the evidence here. It appears that this body, the United Brethren in Christ, was formed a great many years ago, and that a confession of faith was arrived at in 1841, I think,—was crystallized then into its present form or practically its present form. At all events its present form existed at the time that the deed in question was made to certain trustees of this property. That confession of faith is the one which appears printed as that of 1885. In 1889 a general conference of the church was held. At that conference certain changes in the confession of faith were adopted by the majority of the members of the conference. They were adopted only by a majority. A considerable minority left the conference, and claimed that they were the United Brethren in Christ, and that the majority were not; because the majority had adopted, and professed themselves as intending to be governed by, a creed which varied in several important respects—that is to say, in certain respects which a very large number of people may consider important—from the original confession of faith. Without going into detail, I may point out the provision in the new creed dealing with endless punishment, which did not appear in the original, and which was plainly a variation on an important question from the original confession of faith. Then the observance of the Sabbath day was another matter of importance which was dealt with; and there were a number of other changes, some of which would have the effect of admitting into the society persons who would not have been admitted under the former confession of faith, and others of which would have the effect of excluding from the society persons who would not have been excluded under the former confession.

Judgment.

STREET, J.

There was no power which has been properly exercised to alter the confession of faith. It is provided in the constitution of 1885 that 'no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands.' There is in the constitution a provision, that 'there shall be no alteration in the foregoing constitution, unless by request of two-thirds of the whole society.' Now, assuming—which I do not think is clear—but assuming that the alterations have been concurred in by two-thirds of the whole society, within the meaning of the article, still the provision in this section 4 of article 2 of 1885 is found in section 10 of article 1 of the new constitution, which provides that 'the General Conference may —two-thirds of the members elected thereto concurring— propose changes in, or additions to, the confession of faith; provided, that the concurrence of three-fourths of the annual conferences shall be necessary to their final ratification.' Admittedly, that course has not been adopted at all. What was done was this:—a commission was issued and votes were collected, and upon a vote of some 54,000 out of a body of 250,000 or thereabouts, the conference has taken upon itself to alter at once, immediately, the original confession of faith.

As I understand from the admissions, the minority who left the church have their conference, and the defendants have been appointed trustees under them. The question, I think, is, which of these two bodies is the body that under the original confession of faith embodied in the book of 1885 is to be treated as the body called the United Brethren in Christ. It appears to me that the only thing by which that body can be identified is the confession of faith; and, there being two confessions of faith here, one of them being that of the United Brethren in Christ at the time that this conveyance was taken, the other not being that of the United Brethren in Christ, and it being shewn that there has been no alteration authorized by the constitution of the society, I think I must assume that the

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body that holds to the unaltered creed is the body which is truly to be considered as the United Brethren in Christ. It simply comes down before me as a question of that kind: Which of these two bodies is the original society under the original bond which tied these two societies together? I think there is no doubt about it upon these facts. No question is raised as to the regularity of the appointment of the two sets of trustees. It was admitted at the beginning, before we got very far in the evidence, that there were two bodies, and the question was, which was the right one? I think I must decide in favour of the defendants, and that the action must be dismissed with costs."

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th and 30th of September, and 1st of October, 1895.

Robinson, Q. C., and *W. H. P. Clement*, for the appellants. The schism in the church of the United Brethren in Christ out of which this litigation has arisen, has been the subject of judicial investigation in several of the United States of America, and the following are decisions in favour of the view advanced by the appellants: *Schlichter* v. *Keiler*, 156 Pa. St. 119; *Lamb* v. *Cain*, 129 Ind. 486; *Philomath College* v. *Wyatt*, Supreme Court of Oregon, 8th Oct., 1894; *Kuns* v. *Robertson*, 154 Ill. 394; *Russie* v. *Brazzle*, Supreme Court of Missouri, 29th March, 1895. The Supreme Court of Michigan has decided adversely to the appellants' view: *Bear* v. *Heasley*, 98 Mich. 279. The deed under which the property in question in this action is held, conveys the property to certain persons "as trustees for the church of the United Brethren in Christ * * * in trust for the church of the United Brethren in Christ." There is nothing further to define—either as to form of organization or shade of religious belief—the *cestuis que trust*. It is ground common to both appellants

and respondents that the church of the United Brethren in Christ designated in the deed continued as one organic body up to the year 1889, and that a general (quadrennial) conference of the church duly met at York, Pennsylvania, on the 9th of May, 1889. On the 11th May, the conference, by a vote of 110 to 20, adopted the report of a certain committee of the conference, and in consequence of such adoption, fifteen of the minority did not again attend the sessions of the general conference, which continued to meet *de die in diem* and transact business—having always a quorum—up to the 22nd of May, when it adjourned. The body represented by that general conference has since then carried on the work of the church in all its departments as before, and the plaintiffs are admittedly the duly appointed trustees in subordination to the general conference which so adjourned. Argument.

Mr. Justice Street, in dismissing the plaintiffs' action, adopts the "confession of faith," being one chapter out of the twenty-two chapters of the discipline of 1885, as "the only thing by which that body"—the church of the United Brethren in Christ—"can be identified," and bases his judgment solely on the ground that by the adoption of the report above referred to, the general conference under which the plaintiffs claim adopted a confession of faith different from that previously accepted, The appellants submit that this "confession of faith" was not such an essential and distinguishing feature of the church of the United Brethren in Christ, that its alteration would destroy identity; because—

1. Historically considered, the doctrines of the church of the United Brethren in Christ have varied from time to time since the church was organized under that name in 1800. Of the preachers who then met together, "some had been Presbyterians or German Reformed, some Lutherans, and others Mennonites," and the basis of union was an agreement, "that each of them should be at liberty as to the mode and manner of baptism, to perform it according to his own convictions." The first "discipline" was

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that "presented to their brethren" by the first general conference of 1815, "containing the doctrine and rules of the church, desiring that they, together with the Word of God, should be strictly observed." The history of this church in the matter of doctrine, is to be gathered from the "extracts," 1815–1873, inclusive, and there are many instances of creed legislation. It will be seen, therefore, that in 1863—the date of the trust deed in question here—the creed of this church upon many important points of doctrine was a matter upon which the church itself was much divided. To which of the varying phases of belief is the trust in this case to be assigned?

2. Adhesion to the confession of faith *eo nomine* is not a test of membership.

3. Many of the doctrines of the church of the United Brethren in Christ upon important matters, are not contained in the chapter entitled "confession of faith," but are to be found scattered throughout the other chapters of the discipline of 1885. The appellants, therefore, submit that if the question of doctrinal departure is open to the respondents, it must be dealt with in relation to all the recognized beliefs of this church, no matter in what chapter of the discipline contained: see Innes, "Creeds of Scotland," Appendix D., p. 405, where the English authorities on the relation between creed and property, down to 1867, are collected.

4. This "confession of faith" is not distinctive of this particular branch of the Christian church. According to the evidences of the witnesses, it formulates a creed to which nearly all modern evangelical churches might well subscribe. How then can it be taken as a test of the "identity" of this particular church? The appellants, therefore, while not admitting that the confession of faith as contained in the discipline of 1889, is in any material point a departure in doctrine, submit that even if it were its adoption would not be destructive of identity. No perversion of the trust can be alleged if the trust had originally no relation or reference to peculiarity of doc-

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trine, but to connection with a certain organized body—the church of the United Brethren in Christ: *Dorland* v. *Jones*, 14 S. C. R. 39; 12 A. R. 543; *Schlichter* v. *Keiter*, 156 Pa. St. 119, judgment of Stewart, J., in Court below; *Miller* v. *Gable*, 2 Denio 492, at p. 510; *Presbyterian Congregation* v. *Johnston*, 1 W. & S. (Penn.) 1, at p. 37; *Means* v. *Presbyterian Church*, 3 W. & S. (Penn.) 303; *Schnorr's Appeal*, 67 Pa. St. 138, at p. 146; *Princeton* v. *Adams*, 10 Cush. 129; *Gibson* v. *Armstrong*, 7 B. Monroe 481; *Watson* v. *Jones*, 13 Wall. 679. The appellants submit that, organic continuity being shewn, the onus is upon the respondents to shew that the confession of faith of 1889 is a plain and radical departure in doctrine, and that they have not shewn. On the contrary, the appellants submit that an examination of the discipline of 1885 and 1889, and the evidence at the trial will disclose affirmatively that there had been no such departure. The Court will not, it is submitted, deprive of this property those in whom by organic succession it is vested, unless so to do would countenance an obvious perversion of the trust upon which it was granted: *Dorland* v. *Jones*, 12 A. R. 543; *Lamb* v. *Cain*, 129 Ind. 486, and cases therein cited.

The respondents will doubtless also contend that the general conference of 1889, by its adoption of the report above referred to, adopted a constitution so different from the constitution contained in chapter 3 of the discipline of 1885 as to destroy identity. The appellants submit upon this contention:

1. A "constitution" *eo nomine* was no part of this church's organic law. There was an organic law—a framework—reduced to written "rules" for at least twenty-two years before a "constitution" *eo nomine* appears. In 1837 a "constitution" was for the first time adopted. In 1841 the constitution of 1837 was ignored and an entirely new and different constitution adopted. This constitution of 1841 is the one which was amended by the action of the general conference in 1889. The first

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discipline of this church bears date 1815, and every item in the constitution of 1841, other than items relating to the organization of the church, had its origin since 1820, when the church had been twenty years in existence under its present name.

Many enactments upon matters which would appear to be quite as important and distinctive as those carried forward in 1841 into the constitution have been either dropped or carried forward into other chapters of the discipline of 1885.

2. As further shewing that the constitution cannot be taken as a test of identity, it may be pointed out that its provisions of a really constitutional character are very meagre. It professes, in the preamble, to "define the powers and the business of quarterly, annual and general conferences, as recognized by this church." As a matter of fact, it barely mentions annual conferences, and does not mention quarterly conferences at all. It is impossible to get any idea of the working machinery of the church of the United Brethren in Christ, its members, classes, circuits, quarterly and annual conferences, up to its general quadriennial conference, without having recourse to other chapters of the discipline of 1885 to a much greater extent than to the chapter on "constitution."

3. On its face, the constitution anticipates possible changes, and this, the appellants submit, shews conclusively that identity of the body does not depend upon adherence to this particular constitution. The appellants, therefore, submit that in view of the terms of the deed under which the property in question is held, Courts of law can look only at the question of organic continuity. The general conference of 1889 was the duly constituted general conference of the United Brethren in Christ; it met as such, kept its quorum throughout, and the plaintiffs claim as the duly appointed trustees under it of this property.

If the action of the general conference of 1889 was *ultra vires* by reason of the absence of a "request of two-thirds

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of the whole society," the new constitution is not in force, but the general conference did not cease to be the general conference of the church of the United Brethren in Christ, by reason of an attempt (unsuccessful, as the respondents allege) to legislate in a certain line.

The appellants submit, however, that the general conference of 1889 acted within its powers in adopting the amended constitution. The general conference as the supreme legislative body of this church was not bound by the restrictive clauses in the so-called "constitution" of 1841. The first general conference met in 1815, and was a representative legislative assembly elected by a vote of the society in general, in order to accomplish the work of providing the church with a discipline. By it the revision of the confession of faith and rules of discipline of the church were attended to. The records of the general conferences from 1815 to 1837, shew legislation on various matters of church polity, and a majority of the members, electing (presumably) a majority of the delegates to general conference, had legitimate control of the church polity, and no general conference had power to restrict the original constitutional right of the majority.

Even if the restrictive clause was operative to tie the hands of the general conference of 1889, the appellants submit that there was the request of two-thirds of the whole society; that "two-thirds of the whole society" means two-thirds of those who vote upon the question when the opportunity to vote upon it is regularly given. The vote of the membership was 51,070 in favour of the constitution of 1889, as against 3,310 opposed to it, and it was upon the request indicated by this vote that the constitution of 1889 was adopted: *Jenkins* v. *County of Elgin*, 21 C. P. 325; *Erwin* v. *Township of Townsend*, 21 C. P. 330; *Lamb* v. *Cain*, 129 Ind. 486, and cases therein cited.

S. H. Blake, Q. C., for the respondents. The constitution under which the respondents were appointed trustees was at the time of such appointment the duly recognized constitution, having been in the year 1841 duly passed and

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declared to be the recognized constitution and the organic law of the church. That constitution bound all those in the body at the time of its promulgation, who were at liberty either to withdraw or procure its repeal. The appellants have repudiated this constitution, and are seeking to carry on the work of the body under a constitution materially altered. The property in question was conveyed to certain persons as trustees under the constitution of 1841, whose successors in office these respondents are. This body was then governed by the confession of faith, and a constitution accepted in 1841 as the fundamental law of the church, and the beneficiaries under the trust deed were members of the body so governed. The conveyance was "in trust for the church of the United Brethren in Christ," and not, as in some cases, to be held according to a constitution which might thereafter be adopted. It is submitted, therefore, that as at the date of the conveyance there was a well defined confession and constitution, the property became impressed with a trust in favour of the body as it then stood, and that those retaining the constitution and doctrine of that body are entitled to hold the property, and that it cannot be taken from them by those who have withdrawn from the defined constitution and confession: *Attorney-General* v. *Christie*, 13 Gr. 495; *Craigdallie* v. *Aikman*, 1 Dow 1; *Attorney-General* v. *Pearson*, 3 Mer. 353; *Foley* v. *Wontner*, 2 J. & W. 245; *Attorney-General* v. *Aust*, 13 L. T. N. S. 235; *Shore* v. *Wilson*, 9 Cl. & F. 355; *Drummond* v. *Attorney-General*, 2 H. L. C. 837. Even if the power existed to vary the constitution and confession, that alteration could only be made in the manner indicated in the constitution, and this mode has not been adopted. There was no request made by the society for alteration. The request must, under the constitution, have been made by two-thirds of the whole society. It is not pretended that as many as even one-fourth of the whole society dealt with the matter in question. There was no concurrence of the annual conferences. There was no ratification. No day was named for the

taking of the vote. The notices were not sent to those entitled to vote, nor were the returns made in accordance with the requirements of the constitution. The changes sought to be introduced into the body are of great importance. They, as admitted by both parties, deal with the cardinal doctrines of the Bible as held and believed. They are in respect of the introduction of laymen and laywomen into the governing body of the church, whereby *(a)* a woman may preach and be advanced to the office of bishop in the society; *(b)* in respect of eternal punishment and eternal life; *(c)* in respect of the resurrection of the dead, and the resurrection of the body; *(d)* in respect of the communion of saints; *(e)* in respect of the fall in Adam; *(f)* in respect of secret societies; *(g)* in respect of ordinances and sacraments. The cases referred to by the appellants are not binding on this Court, and should not be followed, as *(a)* the facts as brought out in most of these cases differ from the facts as given in evidence in the present case; and *(b)* the American Courts do not adopt the English rule that, where the right of property is concerned, the Court will, in order to determine this question, form its own conclusion upon the points of doctrine and government, but they adopt the conclusion of the ecclesiastical court or body, and take it as correctly expounding all such questions: *McPherson* v. *McKay*, 26 Gr. 141; 4 A. R. 501; *Forbes* v. *Eden*, L. R. I. H. L. Sc. 568; *McMillan* v. *Free Church*, 22 Court of Sess. Cas., 2nd Ser. 290; 23 *ib.*, 1314. Argument.

Robinson, Q. C., in reply.

March 10th, 1896. HAGARTY, C. J. O.:—

There was no dispute as to the regular appointment of the plaintiffs as trustees.

The difficulty arises from the action of the quadrennial conference, which met regularly at York, Pennsylvania, in 1889, which was admittedly the legal conference of the whole church in the United States and in Canada. It is

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said that there were or are some forty congregations with land, and churches thereon, in Canada.

The defendants claim to be the real trustees of the Port Elgin church, and contend that the plaintiffs can claim no right under or since the conference of 1889; that the conference of 1889 no longer is the conference of the United Brethren church in consquence of its proceedings in altering the confession of faith and other departures from the conference of 1841, which forbade any variation or departure.

In 1885 certain changes were proposed by the majority of the general conference of that year, and it seems to have been considered that the constitution, as it stood, was not in harmony with the present wishes of the people, and that it was desirable to amend and improve it.

The defendants relied on the rule that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands," and also on the provision that "there shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society." The general conference of 1885 was held under the constitution of 1841, and a majority vote determined that the general conference had "the right to institute measures looking to the amendment, modification, or change, of the constitution at any time when it is believed that a majority of our people favour a modification thereof."

A board or committee of twenty-seven persons was appointed to consider the present confession of faith and constitution, and to prepare such a form of belief and such amended fundamental rules for the government of the church in the future as would be best adapted to secure its growth and efficiency.

This committee was to take measures for having the proposed confession and constitution submitted for the approval or disapproval of the people, and when the vote was taken, and the result shewed that two-thirds of all the votes cast were given in approval, the bishops were to

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publish and proclaim the result through the official organs of the church, whereupon the confession and constitution thus ratified and adopted were to become the fundamental belief and organic law of the church.

All steps seem to have been duly taken to obtain the votes of members, and the result was that over 54,000 votes were cast, of which about 50,000 were in favour and over 3,000 against the proposed confession and constitution. On the subject of lay delegation, 5,600 voted against, and on secret societies a little over 7,000 voted nay.

It was said that there were over 200,000 members of all ages and sexes in the church, of which some 5,000 or 6,000 were in Germany and Africa.

At the quadrennial conference of May, 1889, the report was adopted by 110 yeas to 20 nays, and the new constitution and confession were adopted and proclaimed.

On the same day fifteen members who voted against the change withdrew from the conference, with one bishop out of the six bishops, and formed themselves the same day into what they held to be the proper quadrennial conference in another building in the same town, and declared that the 110 delegates and members who voted for a new constitution and confession, thereby forming a new church, had thereby vacated their seats as members of the general conference of the church. This new body met several days after and elected certain persons trustees of the printing establishment of the United Brethren, claiming to be the true conference, and declaring their adhesion to the old constitution and confession.

The general conference from which they had seceded continued in session for some days, and adopted a resolution that certain delegates named, who had actively participated in the proceedings of that body from its organization to the close of the third day's session, and had then vacated their seats and formed another church outside and apart from the place properly and officially occupied by the lawfully elected general conference of the church, had irregularly withdrawn from that body, and

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from the church, and were, in view of such action, no longer ministers or members of the church.

It also transacted other business, amongst which was the election of trustees for the printing establishment.

Each party or conference has gone on appointing trustees, and the contest here is between the two sets.

The seceding party appointed the defendants trustees, and the plaintiffs were also appointed trustees of this Port Elgin church and land, and are seeking to have their rights enforced by the Court and to have it declared that the defendants have no right or title; and that the plaintiffs are the rightful trustees, and are claiming that the defendants should be ordered to deliver up possession and not to interfere with the plaintiffs in such possession.

The defendants rest their case on the points that their constitution is unchangeable, that all the proceedings taken to vary it, are wholly void, and that even if there was the power to alter, the proceedings taken to make the change were wholly irregular, and the new constitution invalid, there not being a majority of the whole membership in favour of the change. Of course one of the main contentions at the trial was whether the alterations and changes made were valid and substantial.

The case was tried before our learned brother Street, and it is best to give his judgment in full to understand the grounds on which he proceeded. At the close of the case he gave judgment as follows:

[The learned Chief Justice read the judgment and continued:]

There has been a large amount of litigation in the United States Courts, and judgments delivered on the identical question here discussed, affecting the rights to the churches and land of the United Brethren in different States.

We have been favoured with copies of some seven or eight decisions on this question, all of which, after full review of all the facts, are in favour of the appellants' contention, except one (Michigan) in favour of the respondents.

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We do not accept foreign judgments as binding, but they are valuable to us from their well considered reasoning on the same facts now before us.

It seems clear that the confession and constitution adopted in 1841 were recognized for nearly half a century as the guiding principles of the United Brethren.

I am of opinion that there is no special force in the word "request." When an alteration is adopted by the required majority their expressed assent must, I think, be held to be equivalent to "request," and as to the number necessary to prevail, I think we must assume that it must be determined by two-thirds of the actual voters, notwithstanding that out of an alleged membership of over 200,000 only some 50,000 voted.

In the absence of express provision to the contrary, I think this has been held to be sufficient. This has been usually held in this Province, unless the law provided for a named majority of all persons qualified to vote, and not for a majority of actual voters.

Then as to the alleged unalterable state of the confession. Has the rule on that point been violated?

The Bishops in presenting their report in 1889 point the difficulty. After stating the two opposing views, they say: "Now, while one view or line of interpretation, if pushed to the utmost limit of a literal construction, would make any change whatever utterly impossible, and while the other view, if expanded to the proportions of the most liberal construction possible, would make unquestionable inroads upon our fundamental principles, we must, avoiding these extremes, seek the happy mean between so much conservatism, on the one hand, that any change is impossible, and so much flexibility, on the other hand, that organic law has no sufficient safeguard." This seems to be a fair statement of the position.

The Pennsylvania Supreme Court held as to this in *Schlichter* v. *Keiter*, 156 Pa. St. 119, at p. 143: "This provision is not to receive a technical interpretation, but is to be construed in the light which the whole instru-

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ment throws upon it, and so as to advance the interests of the church and promote its objects. * * The purpose and effect of section 4, when so construed, is not to prohibit changes in the confession of faith that are in the interests of clearness of expression, or fulness of statement, of the accepted doctrines of the church, but to prevent changes in the doctrines to which the church was committed. The provision was not intended as an impassable barrier thrown in the way of improvement of all sorts, but as a protection against the introduction of heretical doctrine, destructive of the distinctive theological character of the church. * * The confession was not absolutely unchangeable in its manner of expressing the doctrines held by the church. It was unchangeable so far as relates to the distinctive doctrines or principles actually embodied in it."

This view seems to pervade all the decisions of the American Courts in favour of the plaintiffs here.

At the trial four gentlemen were examined as theological experts, and, as I understand their evidence, it is uniform in the opinion that no change adopted at the conference in 1889 has amounted to any change in or departure from the original doctrines of the church; that there are verbal changes but no departure from the doctrine; that the new confession differs chiefly in arrangement and in the more full development and statement of doctrines.

No witnesses were called by the defendants to impugn the opinion of the "experts."

It will be a singular and not very satisfactory result if we, on the points discussed by these gentlemen as to the non-existence of substantial difference between the old and the new confessions, decide to differ from their conclusions on matters generally outside the limits of our jurisdiction as judges.

The only ground on which the courts take cognizance of such matters of opinion is to decide rights affecting property.

As said in the Illinois Supreme Court, *Kuns* v. *Robertson*, 154 Ill. 394: "The law is well settled that Courts

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will interfere only to prevent the perversion or abuse of a trust, especially if it be of a charitable or religious nature. * * The trust and abuse of it must be clearly established. * * It must clearly appear that such change or departure has taken place in fundamental doctrine that it cannot be said to be the same, or that the denomination, as it existed before the change, is not, in all essential particulars and purposes, identical with that existing afterward."

In *Schlichter* v. *Keiter*, 156 Pa. St. 119, Willams, J., says, that the question for decision is which of the parties and organizations is the church and society known as the United Brethren in Christ, and the decision depends on the question of ecclesiastical identity.

In the case of *Dorland* v. *Jones*, 12 A. R. 543, we had occasion to discuss and examine the principles on which a civil court in determining the rights to property can interfere, where members of a religious body differ as to the interpretation of its doctrines and beliefs.

The general subject is closely cognate with the present dispute, viz., as to questions arising in the Society of Friends. As here, we had contemporaneous decisions in the United States Courts.

A reference to that case may render it unnecessary to discuss at greater length the course adopted under our law in dealing with such questions.

We say there that the whole burden rests on those asserting that their opponents have so far departed from the fundamental principles of the society, as in effect to cause them to be no longer members thereof, quoting the vigorous language of Shaw, C. J., in *Earle* v. *Wood*, 8 Cush. 430, at p. 459: "So deep and radical, as to destroy its identity with the Society of Friends, who had been invested by law with the enjoyment of property and civil rights."

Lord Eldon's language in *Attorney-General* v. *Pearson*, 3 Mer. 353, at p. 400, so often referred to, is quoted at some length. So also the well-known Lady Hewley's charity cases: *Attorney-General* v. *Shore*, 11 Sim. 592; *Shore* v. *Wilson*, 9 Cl. & F. 355; *Attorney-General* v.

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Gould, 28 Beav. 485. In the latter (the Norwich Baptist case), the Master of the Rolls said: "I have to determine whether the employment of the building is such a perversion of the objects and trusts for which it was established, that is, whether it is a violation of those trusts, which the Court will interfere to prevent."

In delivering judgment in the celebrated case of *Gorham* v. *Bishop of Exeter*, 14 Jur. 443, the Privy Council state their agreement with Lord Stowell's language in *King's Proctor* v. *Stone*, 1 Hagg. Consist. 424: "If any article is really a subject of dubious interpretation, it would be highly improper that this court should fix on one meaning, and proscribe all those who hold a contrary opinion regarding its interpretation."

I need not pursue any further examination of law or authority adopted or referred to in our former judgment.

We came to the conclusion that no case was made out to warrant our interference as a civil court. I am fortified in that view by the arguments and facts proved in this case.

Mr. Blake's vigorous and highly acute cross-examination of the "theological experts," and their very full and dispassionate answers exhibit forcibly the "metaphysical distinctions and subtleties" on which it is sought to establish the charges made by the defendants of departures from doctrine and alleged differences of creeds.

I think the defence has failed to establish any substantial or important variation. The learned clerical masters cannot find such, and I must equally admit my inability to discover them.

The original condition that there should be no alteration in the existing confession of faith is, I think, sufficiently met by the satisfactory proof that it is not altered, unless the use of more explicit or definite language alters materially the substance, leaving the doctrine unimpeached or unchanged. I cannot see how any court should apply a cast iron rule to the serious possible injury of a religious society in rendering them unable to explain more definitely

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their peculiar doctrines, directions, or system of procedure, however experience may shew the absolute necessity for the use of larger or more intelligible language.

The constitution of this suit is peculiar. The original church of the United Brethren in Christ—unless destroyed, as the defendants urge, by the proceedings of 1889—continues in full action, and its right so to act has been determined in many judicial judgments.

This church has in proper form appointed the plaintiffs as trustees of the Port Elgin land and church. The defendants, repudiating all right on the plaintiffs' part, assume to themselves the possession, name, and office, of that church. I hardly see the propriety of this unless they have obtained some clear declaration of their rights.

In *Dorland* v. *Jones*, 12 A. R. 543, I expressed my opinion "that the proper course for the new organization to have taken to test their rights would have been a proceeding by information or other method to obtain the judgment of the courts to establish their claim and to oust the plaintiffs for their alleged lapses from true doctrine."

This case strengthens my then view. Such seems to have been the course usually adopted under our law, as in *Attorney-General* v. *Shore*, 11 Sim. 592, and *Shore* v. *Wilson*, 9 Cl. & F. 355, where the Unitarian occupants of the property were ousted by the Trinitarian complainants on the ground of lapse from the trusts of the founder.

In that view the present defendants would initiate the proceedings, and on proof of undoubted lapse from the pious founder's trusts would obtain the judgment of the court. The whole burden of proof of heretical lapse would be on the assailants.

Primâ facie the plaintiffs here represent the United Brethren church, managing its properties and revenues. Unless, therefore, its identity is gone, we may imagine in Chief Justice Shaw's words, the property becoming "derelict."

I think that the defence failed as to the manner in which

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the votes were taken and as to the principle on which the two-thirds vote was treated.

I do not think it necessary to follow one by one the charges as to alteration in the different subjects. They are fully treated and disposed of in the United States authorities on this general question. I am satisfied with such disposition.

I think, on the whole, that the defendants failed to establish a case for a civil court, dealing with rights to property, to accept their objections to the orthodoxy of the plaintiffs, disqualifying them from the enjoyment of this property. Even without the able and careful evidence of the learned experts, I am unable to see any such departure from the accepted constitutional views of the United Brethren in Christ as would warrant the action of the fifteen brethren who dissented from the large body of the quadrennial conference of 1889 in attempting to usurp the name, functions, and property, of the vast majority.

I am obliged to differ from the judgment of my learned brother, and I think that the appeal must be allowed and judgment entered for the plaintiffs in the Court below with costs.

BURTON, J.A.:—

I agree in the reasoning and the result arrived at in the judgment of my brother Maclennan.

My view of the case, briefly stated, is that the consent required by the constitution for any alteration was legally given.

If the view taken by the appellants of the words "unless by request of two-thirds of the whole society" be correct, it would follow that the constitution partakes of the character of the laws of the Medes and Persians, as it would be impossible to obtain such a request, and almost equally so to ascertain with anything like precision whether the request, however numerously signed, did contain the requisite majority of the members scattered apparently

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over the whole world. I think, therefore, that the only reasonable construction to be placed upon those words is two-thirds of those voting.

I do not enter into the discussion, upon which so much expert testimony, if I may so express myself, was given at the trial, because, assuming that I am right as to the two-thirds vote, I consider that the decision of the general conference, which had thereby jurisdiction and was the final judicial tribunal, is and ought to be conclusive. As I understand the law in this respect, it is that when the right of property is dependent on the question of doctrine and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.

I fully concur, therefore, in the view that the appeal should be allowed.

OSLER, J. A. :—

We are not to enquire into the regularity of the appointment of either the plaintiffs or the defendants as trustees for the church of the United Brethren in Christ under the deed of the 28th of November, 1863. The only question is, which of the two bodies represented by them respectively, is the church of the United Brethren in Christ? The plaintiffs represent the liberals or those who adhere to the constitution and confession of faith as passed and submitted to the members of the society and voted upon by them under the authority of the general conference of 1885 and afterwards adopted and ratified by that of 1889; and the defendants represent the radicals, who reject the confession and constitution then adopted and adhere to the terms of those in existence when the conferences of 1885 and 1889 and former conferences met. It is simply a question of the identity—the ecclesiastical identity—of the body.

Are the plaintiffs and those whom they represent the

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seceders, or are the defendants? If the latter, the plaintiffs, as the duly appointed trustees for the church, are entitled to recover the property in question in the suit.

The defendants' position is taken upon article 2, clause 4, of the discipline of 1885: "No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands;" and upon article 4: "There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society."

They contend that the confession and constitution as formulated and voted on by the members of the society and adopted by the general conference of 1889, are infractions of both these provisions, and that those adhering to them are therefore no longer the church of the United Brethren in Christ.

After a careful examination of the record and proceedings, I am of opinion, with all respect to my brother Street, that this contention is not entitled to prevail. I think the fifteen persons who withdrew from the general conference of 1889, and who formed the new religious body represented by the defendants, were the seceders from the church of the United Brethren. They went out from among them because they were no longer of them when they refused to adhere to the lawful action of the church.

I think the revision of the confession has not been of such a character as to effect a material change in the doctrines of the church as found in the discipline of 1885, and to this effect was the evidence of the witnesses called for the plaintiffs, none being called for the defendants. Some change in phraseology, some amplification of expression, even some transposition to it of other parts of the discipline, undoubtedly may be found, but it must be regarded and construed as a whole and not with too great regard to verbal niceties, and, so treated, I can find nothing in it which can be said to be opposed to the faith and doctrine found in the discipline of 1885, nothing, the adoption of which in the discipline of 1889 destroys or changes the historical continuity or identity of the church. Changes

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which are to bring about such a result must be vital in their character, affecting the organic life and beliefs of the body, the distinctive theological character of the church. We are not dealing with a case in which by the terms of the deed certain specified articles of faith are to be adhered to or a certain prescribed ritual to be observed. What the defendants must prove is, that, to use the language of Chief Justice Shaw in *Earle* v. *Wood*, 8 Cush. 430, there has been a departure from the fundamental principles of the body so deep and radical as to destroy its identity with the body which had been invested by law with the enjoyment of the property. Here I must hold that there is no such departure, nor can I say that the fundamental doctrines of the church are infringed, or its identity lost, because some of them may have been transferred to the confession which were formerly in another part of the discipline. To use the language of one of the learned American Judges who has dealt with the question between these opposing parties: "If justification and sanctification are doctrines to which all members of the church must subscribe before they can become such, how can it be important whether they are in the confession or in (another part of) the discipline." I must add that my examination of the evidence leads me to doubt whether from 1815 downwards there has ever been recognized any such inflexible rule or prohibition against making changes in the confession not involving the organic nature of the church as to invalidate the action of the conference of 1889, or to make those adhering less members of the church of the United Brethren in Christ than before.

The remaining question is whether, apart from the confession, the action of the general conferences of 1885 and 1889 sufficiently complied with the requirements of article 4. Here, also, we are dealing with a constitutional provision which requires a broad and liberal construction to be placed upon it, one which will render it workable and useful, according to the presumable intention of its framers, and not one which would practically prevent it from ever being acted upon at all. Therefore I hold, first,

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that a request to alter the constitution is well evidenced by a vote of the members of the church upon alterations which may proposed to the church by the general conference. Some one must set the work on foot, if any one thinks that alterations should be made, and by no one can this be more appropriately done than by the general conference or great council of the church, and if their proposal is acceded to by the members by their vote thereon, that is, in my opinion, a request of the society to the general conference to take the action voted for within the meaning of the rule. Secondly, I am of opinion that two-thirds of the whole society means two-thirds of those voting thereon. There is much force in the remark made in one of the judgments in a case in the Ohio Circuit Court, *Rike* v. *Floyd*, 6 Ohio Circuit Court 80, that "the framer of the rule must have meant that two-thirds of those voting should be sufficient, otherwise how were they to determine that the requisite majority had voted for or against a measure, there being no provision for an enumeration, and the church being opposed to making one?"

I think it is shewn that the fullest and most effectual methods were adopted for bringing the proposed changes to the notice of the members of the church and for providing a convenient time and manner of taking the vote, and that the action of the general conference of 1889 in declaring "that by the concurrent action of the society and the general conference, the revised constitution and confession of faith had been adopted and were to be accepted as the constitution and creed of the society," was legal, and must be upheld. The plaintiffs and those adhering to the action of that conference are of the church and society of the United Brethren in Christ, as fully to all intents and purposes as they were prior to 1889; and the defendants, though their theological beliefs may be the same, are yet "ecclesiastically distinct as a result of their own acts, and have no title to the property held by the society prior to that date."

The appeal must, therefore, be allowed, and judgment entered for the plaintiffs.

MACLENNAN, J. A.:— Judgment.

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This is a dispute about a church property, a parcel of land in the town of Port Elgin, in the county of Bruce, with a church erected thereon. It was conveyed in 1863 to three named persons as trustees for the church of the United Brethren in Christ, and their successors in office, in trust for "the church of the United Brethren in Christ," to erect and build, or cause to be built, a house of worship for the members of the said church, the *habendum* being unto the said parties of the third part and their successors in office forever. Both the plaintiffs and defendants claim to be the present trustees of the property under that conveyance, both claiming to be the lawful successors of the original trustees, as representing the church of the United Brethern in Christ; and the question is, which of them is right. The parties have simplified the question for decision a good deal by mutual admissions. One of these is that if the plaintiffs are held entitled to succeed on the whole case, then they are the duly elected trustees of the Port Elgin church; and if the defendants are entitled to succeed on the whole case, then they are the duly elected trustees of said church; and the admissions in this paragraph are to obviate the necessity of either party giving formal proof of the regularity of their appointment by the respective bodies to which they acknowledge allegiance.

Having regard to this admission, and the other evidence, it must be taken that there are now in and about Port Elgin two separate organized bodies of Christians calling themselves the church of the United Brethren in Christ, and each claiming to be the church of that name, within the meaning of the conveyance of 1863, and the trusts thereof. It must also be taken to be admitted that both the plaintiffs and defendants have respectively been duly elected by the respective bodies whom they represent, whichever of them may be held to be in law entitled to the benefit of the trusts of the deed. The question, there-

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fore, to be determined is, which of them truly and legally represents the church of the United Brethren in Christ, which existed in the year 1863? If the plaintiffs, they ought to succeed; if the defendants, the action fails. The learned Judge has dismissed the action.

Until the year 1889, this religious body was united; but in that year a difference arose, in consequence of which there was a secession. At a meeting of the general conference in May of that year, in consequence of a vote upon the adoption of an amended discipline, which was carried by 110 to 20, the minority withdrew from the conference and constituted a separate conference, claiming that to be the legal and only true conference of the body. This was followed by a similar secession in the church at large; and the plaintiffs are the trustees elected for and on behalf of the members who adhered, and still adhere, to the original conference, while the defendants represent those who repudiate the original conference, and maintain that the secession conference is the true one. Under these circumstances *primâ facie* the defendants are wrong, for it is not disputed that the conference from which they withdrew was properly constituted and was a lawful meeting.

The trust deed does not attempt to define the faith, or religious tenets, of the body who are its objects, except that they are a body of Christians. The trust is for a particular known organized body, and it rests upon the defendants to prove that by some act of the original body it ceased to be in law the body described in the trust deed, and entitled to the benefit of it. What they say is, that by a resolution passed by the majority of the members of the conference they adopted an amended constitution and creed, and that the resolution was invalid and void and not binding on the church or upon the minority who voted against it, and seceded in consequence. They say in their statement of defence that before that time the church had a well defined constitution and a confession of faith which laid down clearly its doctrine and teachings, and that the resolution in question passed

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certain rules and regulations whereby they varied, in material matters, both the constitution and the confession of faith; that by one of the clauses of the constitution it was declared to be unchangeable, and so could not be changed or varied, and that, even if there was power to vary it, the proceedings adopted to accomplish the change were irregular and invalid.

The trust not being for the support and maintenance of any particular religious dogmas or tenets, and it being conceded to have been for the benefit of an existing organized body, and that body having preserved its organization and continuity, it is not easy to see how the mere passing of an illegal resolution would deprive them of the benefit of the trust or give it to the seceders. The case, however, was not argued before us on any such narrow ground, but on the broad ground of the validity or invalidity of the action of the majority of the conference of 1889, and that is the question which I propose to consider.

This church had its origin about 150 years ago in the United States. Its growth was slow and gradual. The first conference was at Baltimore in 1789; another was held in Pennsylvania in 1791; another in 1800 in Maryland, and subsequently another in Ohio. The first general or quadrennial conference was not until 1815, in Pennsylvania, and it was then, for the first time, that a discipline for the whole church was adopted. This discipline was composed of three general divisions: a confession of faith; a constitution composed of four brief articles declared to be intended to define the powers and business of quarterly, annual and quadrennial or general conferences, as recognized by the church; and, thirdly, an elaborate system of rules and regulations for the conduct and management of the affairs, both temporal and spiritual, of the church at large and its members.

These three divisions, however, are to a great extent, merely nominal, at all events so far as the first and third are concerned; for there are in reality more of their reli-

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gious beliefs and tenets to be found in their rules and regulations, than in the confession of faith so called. According to this discipline the government of the church is by congregational boards, quarterly, annual, and quadrennial conferences, all constituted by representation. The congregational board is for the discussion and management of congregational affairs. The quarterly conference for the affairs of a number of congregations in a particular district; annual conferences composed of the elders and licentiate preachers of a number of districts, and the quadrennial or general conference, composed of all the bishops and elders elected by members of the whole church.

The evidence shews that the discipline, as it was in 1889, was the creation of the general conference, altered, amended, expanded, and improved from time to time by that body, which was regarded as the supreme and ultimate legislative and judicial authority of the church. It does not appear that the discipline, either as originally adopted, or as regards subsequent changes and amendments, had ever been submitted to, or had ever received the sanction of the members, otherwise than through the votes of their representatives in the general conference.

The only means we have of determining the powers of the general conference and its limitations, is by observing the acts which they did, and which they must be presumed to have had authority to do. Such a body as this must have some fundamental bond of union—some general objects for which the members have associated themselves together. The total abandonment of that bond, or those objects, would be dissolution. But the creed and principles of a religious body consist of a vast variety of propositions, capable of more or less exact concrete expression in language. The discipline of such bodies is nothing more or less than an attempt to express with clearness and definiteness, the beliefs, the form of government, and the rules of conduct of the members. Differences of opinion will necessarily arise as to the meaning

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and purport of the language employed for that purpose. There must be some means of determining these differences: and that is one great object and function of the several courts, as they may be called, of such bodies, the monthly board, the quarterly, the annual and the general conferences. Take, for example, the confession of faith as contained in the discipline of 1885. It is possible that members might differ as to the meaning of some if not all of its provisions. How is such a difference to be settled? Who is to decide? Is it not the general conference? And if so, how is the decision to be expressed; must it not be by some attempt at a more clear and definite statement of the doctrine, to amend and improve the existing statement of it? We see that this church has a body of teachers and preachers; teachers and preachers of what? Why, of the religious doctrines and principles expressed in general terms in the confession. We see, therefore, that this is a Christian body; that the bond of their union is the Christian religion, as they understand it. More than fifty years ago the conference embodied their understanding of it in a creed, necessarily brief and general in its terms. They also adopted a written constitution for government, and rules of procedure and conduct, and they called the whole their discipline. Under that constitution what provision is there for determining disputes on questions of doctrine, of worship, of the sacraments, etc., which must, in the very nature of things, arise in a body composed of many thousand members? We are told that in 1888 the number of members was about 200,000, the number of churches about 3,000, and the number of annual conferences 45. The general conference is a representative body elected every four years by the members at large from among the elders in every annual conference district, and it meets once in every four years for the transaction of its business. Its constitution, therefore, is such that if the church at large should disapprove of anything it should enact, it is not without remedy, but can correct it at the next conference by electing representatives to carry out

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its views. The conference, in short, is responsible to the church at large, which can determine and regulate its acts and policy.

The decision of the House of Lords in *Forbes* v. *Eden*, L. R. 1 H. L. Sc. 568, shews that such a body as this church is a mere voluntary association. Lord Cranworth says, at p. 584, that the synod of a church more resembles the legislature of a state than the articles of a partnership; that a religious body forms an *imperium in imperio*, of which the synod is the supreme body. In the present case, for fifty years the conference regarded itself as the supreme body, and so acted. Acting in its representative capacity it enacted a discipline for the church at large, and from time to time, extending over forty years, altered it, made changes in it, and amended it, and its acts were acquiesced in.

It seems, however, that the discipline which existed in 1885 was thought by many not to be satisfactory, and in or before that year a very prevalent desire was expressed for its amendment. In the conference of that year a committee was appointed to consider the subject, which reported, among other things: "That the present constitution of the church was never submitted to the suffrage of the members and ministry of the church for ratification either by popular vote or by conventional approval, though it purports to be the constitution of the members of the denomination."

Second. "That throughout most of its history it has been the subject of question and differences of opinion as to its legality and binding force as an organic law."

Fourth. "That the constitution has acquired its force only by the partial and silent assent of the church, and that the general conference has a right to institute measures looking to the amendment, modification or change of the constitution at any time, when it is believed that a majority of our people favour a modification thereof."

And fifth. "That the constitution as it stands is not in harmony with the present wishes of our people, as has been indicated in discussions, petitions and elections during the past year."

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The report containing these statements was adopted by the conference, with the addition of the following words to the fourth paragraph: "This, however, shall not be construed or interpreted as invalidating the constitutional instrument."

The report also recommended the appointment of a commission composed of twenty-seven persons—bishops, ministers and laymen—to prepare such a form of belief and such amended fundamental rules for the government of the church in the future as would in their judgment be best adapted to secure its growth and efficiency in the work of evangelizing the world. This commission was appointed, and it was directed to adopt and carry out a plan by which the proposed confession of faith and constitution might receive the largest possible attention and expression of approval or disapproval by the people, including all necessary regulations for taking, counting and reporting the vote, and also for proclaiming the result in the event of the vote of the church shewing that two-thirds of all the votes cast should have been given in approval of the proposed confession and constitution.

The commission acted without delay, and on the 1st of January, 1886, published the proposed constitution and confession throughout the church, and appointed that the votes of the people should be taken in and during the month of November, 1888, thus giving ample time for consideration and discussion of its provisions by the whole church.

It was not the purpose or intention of the conference to change or do away with the distinctive faith, usages or principles of the church, and the instructions given to the commission provided:

First. "That the commission shall preserve unchanged in substance the present confession of faith so far as it is clear."

Second. "That it shall retain the present itinerant plan."

And third. "It shall keep sacred the general usages and

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distinctive principles of the church on all great moral reforms as sustained by the Word of God in so far as the province of their work may touch them."

We have seen what the seceders complained of. It was that the great majority of the conference varied in material matters the constitution and confession; that the constitution was unchangeable, and, if not, that the proceedings adopted for making the change were irregular.

With regard to the confession we have no right to say that the changes made are not, in a sense, material, or that they are unimportant. The subjects dealt with are subjects on which good men may and do differ, and attach the greatest importance to their respective views. But when a difference has arisen as to what the teaching of the church is, or as to the meaning of a statement of doctrine in the confession, or when a suggestion is made that a statement is obscure and imperfect, or a desire arises that something well understood but not already expressed ought to be expressed, why should not the assembled body of the elders, the teachers of the church, not endeavour to define what was indefinite, to express clearly what was obscure, to add what was well understood but had hitherto been omitted; in short, to put in an improved form what they had all been teaching? When we compare the two confessions we see that no more than that has been done, and such is the purport of the expert evidence which has been given in the case.

The proposal to make these changes had arisen in the conference of 1885, and the draft of the amended discipline was prepared and printed in that year, and by direction of the conference was published throughout the church for nearly three years. Therefore, when the elections for the conference of 1889 took place, the proposed amended discipline was, and had been for a long time, before the electorate, and it must be regarded as having been passed upon by them at the election.

The conference thus elected assembled in 1889, there being 131 members present, and 110 of these teachers of

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the church voted for the new discipline, twenty of them dissenting. Under these circumstances, having regard to the nature and extent of the alterations and amendments made in the confession of faith and the doctrines of the church, I think it is plain that the conference acted clearly within the limits of their power, and that their act was a legitimate exercise of their authority as the constituted interpreters of the faith and doctrines of the church. I regard what was done not as a change, but as an interpretation of the faith of the church. What this large majority of the teachers of the church in effect said was: This document expresses as nearly as we can express it the doctrine and faith of our church as we are teaching it and preaching it to our people every day.

So much for the changes made in the confession of faith. It remains to consider the changes made in the constitution, and the regularity of the proceedings of the conference in doing what they did. With reference to the power to amend and alter the constitution, that is to say, the form of government, not in its general features but in matters of detail, everything that I have said about the confession of faith and doctrine is entirely applicable. It is *a fortiori* that the general conference has, and must have, the power to make such amendments and improvements as may be called for from time to time, and as experience shews to be desirable; and it is impossible, therefore, to maintain that the constitution was unchangeable.

We have seen the genesis of the general conference. Its very existence proclaims that by representation, for the highest purposes, it is the whole church. Therefore, in effect, the whole church meets for deliberation every four years, and what the whole church does at one meeting it can undo or modify at another. It is impossible for one meeting to tie the hands of the next or to make the constitution unchangeable. They may make rules of order and procedure, but the same power which makes them may alter or vary them from time to time.

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There is no evidence that any general conference ever had a mandate from all the members to make an unchangeable constitution, if even that would be binding. The constitution as it stood before the alteration complained of, contained these provisions:

Article IV. There shall be no alteration of the foregoing constitution unless by request of two-thirds of the whole society.

Article II., sec. 4. No rule or ordinance shall at any time be passed to change or do away the confession of faith as it now stands; nor to destroy the itinerant plan.

Article III., sec. 5. There shall no rule be adopted that will infringe upon the rights of any as it relates to the mode of baptism, the Sacrament of the Lord's Supper, or the washing of feet.

The constitution is expressed to be ordained by the members of the church, and begins thus: We, the members of the United Brethren in Christ, etc., do ordain, etc.; and its purpose is expressed to be, among other things, to produce and secure a uniform mode of action in faith and practice, also to define the power and business of quarterly, annual and general conferences, as recognized by the church. And Article I., sec. 1, provides that "all ecclesiastical power herein granted to make or repeal any rule of discipline is vested in a general conference, which shall consist of elders elected by the members in every conference district throughout the society."

Acting under this constitution, the general conference of 1885 proceeded to amend the discipline, and they were met by the above Article IV., that it could not be done without request of two-thirds of the whole society. The question arose what was the proper construction of the article? A previous constitution had provided that no general conference should have the power to alter or amend it, except it be by a vote of two-thirds of that body. The change of language in the later article hardly left it open to contend that two-thirds of the whole society meant the society as represented in and by the members of the

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conference itself. It was thought necessary, however, to put some construction upon it, and the construction which was put upon it after consideration was that a reasonable compliance with the article would be a majority of two-thirds, upon a vote to be taken upon the question.

Rightly or wrongly, that was the construction put by this body upon their own rule; and for such a purpose I think they were the proper and only authority to put a construction upon it. Nor, when one considers all the difficulties of procuring a request from two-thirds of all the members of the church, does the construction which they put upon it appear to be an unreasonable one. They accordingly prepared and passed the amended discipline, prepared a ballot for a vote upon it in four several parts, and distributed both among the members. The result was a total vote of 54,000, with a majority largely in excess of two-thirds in favour of each of the four separate parts—the average vote upon the whole being ten to one in favour of the whole discipline.

It was after this vote that the election of members for the conference of 1889 took place, and the members then elected ratified the new discipline by a vote of 110 to 20, as already mentioned. I think it is impossible to say that the amended discipline adopted under these circumstances was a void act, or such a departure from or abandonment of the essential character of this body that its identity was lost, or that it ceased to be in law and in fact the religious body or denomination which had theretofore existed, and which had been known as the church of the United Brethren in Christ. That being so, it follows that the fifteen who seceded did not, and could not, if they otherwise could, carry with them the identity of the body, and that they are a new organization, even though they have adopted and have acted under the constitution of the old body, and have retained and still use the old name.

I quote again from Lord Cranworth's judgment in *Forbes* v. *Eden*, L. R. 1 H. L. Sc. 568, at p. 582. He says: "There is no jurisdiction in the Court of Session to reduce

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the rules of a voluntary society, or, indeed, to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which a member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If, connected with any office in a voluntary association, there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel, or a school, then, incidentally, the court may have imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it."

In the proceedings now before us, there was no question of property involved. There was nothing but a question how far the authoritative statement of the beliefs of the church by its supreme court, was correct; and whether the interpretation put upon their own rules and their action thereon were binding upon their people. According to law such bodies are themselves the sole judges of these matters; and that being so, their action, right or wrong, did not and could not destroy their identity.

I have thought it better to examine and consider the case for myself before perusing the numerous decisions in the Courts of the United States arising out of the same secession, and that is the course I have pursued. I have since perused those decisions, and find that all the elaborate judgments of those Courts but one, come to the same conclusion at which I have arrived, and on substantially the same grounds.

My opinion, therefore, is, that the appeal should be allowed, and that there should be judgment for the plaintiffs.

Appeal allowed.

SCARLETT V. NATTRESS.

Chose in Action—Covenant—Assignment of Covenant by one Joint Covenantee to his Co-covenantees—Mercantile Amendment Act, R. S. O. ch. 122—Mortgage—Conveyance of Equity to One of Several Joint Mortgagees.

One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. ch. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff, BURTON, J.A., dissenting on this point.

A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt.

Judgment of the Queen's Bench Division affirmed.

THIS was an appeal by the defendant from the judgment of the Queen's Bench Division. Statement.

The following statement of facts is taken from the judgment of STREET, J., in the Divisional Court:—

On the 20th of August, 1888, the plaintiffs and their father, J. A. Scarlett, owned about 100 acres of land in the township of York, being the east-half of lot 36, in the third concession from the bay; and being such owners they entered into articles of partnership agreeing to become partners in the making of brick upon the north-east corner of the lot under the name of E. W. Scarlett & Co., declaring that the present stock-in-trade and plant connected with the business, owned at the time by the parties in equal shares, was to be considered the capital, and that the four partners should be entitled to profits and should share losses in equal proportions, and that the profits should be applied in payment of certain mortgages existing upon the east 75 acres of the east-half of lot 36. E. W. Scarlett was appointed manager and book-keeper.

The articles contain a further provision, empowering any one or more of the parties to enter into agreements for the sale of any of the sub-lots laid down upon a plan of a subdivision of a part of the east half of lot 36 at certain prices therein set forth, and a provision that the proceeds of any such sales should be applied in paying off the mortgages until they should be paid in full. Shortly before

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the 28th of February, 1889, the defendant verbally agreed with J. A. Scarlett for the purchase of lots 47 and 48, and lots 94, 95 and 96, shewn upon the plan above mentioned, but owing to some question arising as to the title, the transaction was closed only as to lots 47 and 48, which were conveyed by the plaintiffs and J. A. Scarlett to the defendant on the 28th of February, 1889. On the same day the defendant gave back to the plaintiffs and J. A. Scarlett a separate mortgage upon each of the two lots 47 and 48 for $600, making $1,200 in all, for the balance unpaid of the purchase money of the two lots. These mortgages are in the usual statutory form without any recitals. On the 6th of April, 1889, the defendant carried out his intended purchase of the three other lots, 94, 95 and 96, by taking a conveyance of them, and giving back a separate mortgage upon each lot for unpaid purchase money. On the 5th of February, 1890, the three plaintiffs sold to their father, J. A. Scarlett, and two men named Birney, all the unsold portions of the east-half of lot 36, including the brickyard, taking back a mortgage upon the property conveyed for $120,000, being part of the purchase money. From the time of this transaction, J. A. Scarlett ceased to be a partner in the brick business which was carried on by the three plaintiffs, who became lessees of the brickyard at a rental of $600 a year.

On the 8th of February, 1890, the defendant sold and conveyed to Jesse C. Smith, lots 47 and 48, subject to the payment of the two mortgages he had made for $600 each to the plaintiffs and J. A. Scarlett.

By deed bearing date the 1st of July, 1890, Jesse C. Smith conveyed to J. A. Scarlett, lots 47 and 48, subject to the two mortgages, which J. A. Scarlett covenanted with Smith to pay off and discharge as part of the consideration for the conveyance; the affidavit of execution of this conveyance by Scarlett, the grantee, is sworn on the 19th of July, 1890, and the conveyance is registered on that day.

By assignment dated the 8th of July, 1890, the three

plaintiffs and John A. Scarlett in consideration of $4,500, assigned and set over to the Farmers' Loan Company, twelve mortgages upon twelve of the lots in the subdivision above mentioned. The affidavit of execution upon this assignment is sworn on the 10th of July, 1890, and the instrument is registered on the 11th of July, 1890. The interest on the two mortgages for $600 each was paid to E. W. Scarlett down to the 1st of July, 1890, but no interest has since been paid. The original purchase money as well as the interest paid, was entered by E. W. Scarlett in the books of the firm of E. W. Scarlett & Co., was deposited to their bank account, and was divided along with the partnership moneys. Statement.

By assignment dated the 11th of August, 1890, J. A. Scarlett assigned to the three plaintiffs all his interest in the two mortgages in question with the money thereby secured and the lands therein described.

During the early part of the year 1894, the plaintiffs called upon the defendant for payment of the $1,200 and interest, secured by the two mortgages in question; he refused to pay, alleging that his liability upon his covenant could not be enforced because J. A. Scarlett, one of the original mortgagees, had assumed payment of the amount when he took the conveyance of the lands covered by the mortgages and upon other grounds.

On the 1st of October, 1894, Jesse C. Smith assigned to the defendant his claim against J. A. Scarlett under the covenant of the latter to pay off the two mortgages in question.

On the 2nd of October, 1894, the three plaintiffs brought this action upon the covenant, alleging that the fourth original mortgagee, J. A. Scarlett, had assigned to them his rights under the covenant and the mortgage.

Lot 48, which was one of the lots above mentioned, was shewn upon the plan as a corner lot bounded on the west by a street called Symes street. This street, after the conveyance by the plaintiffs to J. A. Scarlett and the Birneys, was included in a further conveyance from the

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plaintiffs to the same parties by which they purported to convey the street to them; and it appeared that an intention existed at one time to change the position of Symes street by moving it further west, but that this intention had not been carried out. A plan had been registered, however, by which a street abutting on the other lots 94, 95 and 96, had been altered in its position, and the signatures of the plaintiffs appeared upon the face of this plan.

The defendant, in his defence, contended that the effect of the conveyance from Jesse C. Smith to J. A. Scarlett, one of the original mortgagees, and of his agreement to pay off the mortgage, was equivalent to a release of the mortgage debt, because the covenant of the defendant was with the four mortgagees jointly and not severally; that the evidence shewed them to be partners, and the debt to be a partnership debt, and that a release by one partner of a debt due to the firm was an extinguishment of the debt; that the sale of the five lots was an entire bargain, and although carried out in the shape of five distinct bargains, did not on that account lose its original character, and that the plaintiffs by becoming parties to a new plan had so altered the condition of the land that they could not on redemption restore it to the same plight as it was when pledged to them and so could not enforce the covenant.

The action was tried at Toronto on the 25th of April, 1895, before BOYD, C., who gave judgment in favour of the plaintiffs.

The judgment was affirmed by the Queen's Bench Division (FALCONBRIDGE, and STREET, JJ.), on the 13th of June, 1895, the judgment of the Court being delivered as follows by STREET, J.:—

[The learned Judge stated the facts as above set out and continued:]

The evidence shews that the money which J. A. Scarlett obtained from the Farmers' Loan Company for the mortgages assigned by him and the plaintiffs at his request to

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that company, was required and used by him for the purpose, amongst others, of buying the equity of redemption in lots 47 and 48 from Smith. This fact leads strongly to the conclusion that, notwithstanding the fact that the conveyance from J. C. Smith to J. A. Scarlett is dated the 1st of July, 1890, and the assignment from the plaintiffs and J. A. Scarlett to the Farmers' Loan Company is dated the 8th of July, 1890, the latter transaction was in fact completed first; and this conclusion is borne out by the circumstance that the affidavit of execution of the assignment to the Farmers' Loan Company is sworn on the 10th of July, 1890, and the assignment is registered on the 11th of July, 1890, while the affidavit of execution of the conveyance from Smith to Scarlett is not sworn until the 19th of July, 1890, so that I fully concur in the Chancellor's statement that the assignment was prior to the conveyance in point of time. As the assignment covered the share of J. A. Scarlett in the mortgages, then held by the four plaintiffs, the remainder of them, including the two upon which the present action is brought, thenceforth belonged to the three plaintiffs in equal shares free from any claim of J. A. Scarlett, and this state of things was completed on the 11th of August, 1890, by the formal assignment from J. A. Scarlett to the plaintiffs.

The ownership of the plaintiffs, however, dated back to the time when they carried out their part of the division of the mortgages with J. A. Scarlett by assigning to him his share of them. They took, of course, subject to any equities existing at that time, but to none which came into being after that time. Had the transaction between Smith and J. A. Scarlett been carried out before the division of the mortgages and while J. A. Scarlett was, therefore, still interested in the two mortgages sued on, I think the defendant would have had an equity to prevent any recovery in respect of his share of the mortgage money; because the interest of the mortgagees in the mortgage money though in form joint, is considered in equity to be several: *Steeds* v. *Steeds*, 22 Q. B. D. 537. If J. A. Scarlett had

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been a sole mortgagee the existence of his covenant with J. C. Smith to pay off the mortgage would have been an answer to an action by him upon the covenant in the mortgage of the mortgagor to pay the mortgage debt and it would upon the same principle have been an answer to so much of the present action as relates to his share of the mortgage debt had the equity arisen before the plaintiffs became assignees of it.

It is objected by the defendant that Smith entered into the arrangement with J. A. Scarlett, under which the latter became liable to pay off the mortgage, without notice of any assignment from J. A. Scarlett to the plaintiffs of his share of the mortgage money; but I am unable to see on what principle the plaintiffs were bound to give notice to Smith of the assignment to them. Had the transaction been one between the defendant, the original mortgagor, and Scarlett, then I think it is clear that the defendant might successfully have urged this contention, because he was entitled to assume that the four plaintiffs preserved unchanged their rights *inter se* until he had notice from them to the contrary; but there is nothing in the evidence to shew that the plaintiffs had any knowledge that J. C. Smith had become the person liable to pay the mortgage, and he cannot, therefore, I think, complain that notice of the change of ownership in it was not given to him, and he cannot rely upon the Registry Act, for the plaintiffs were not bound to search for subsequent dealings with the equity of redemption.

It is true that J. A. Scarlett must have been aware before making the agreement which he did with J. C. Smith, that the latter had assumed payment of the mortgages, but constructive notice must not, I think, be imputed from that fact to the plaintiffs, because a practical severance of his interests from those of the plaintiffs had taken place some months before, and because it was his interest under the circumstances not to do anything likely to lead to notice being given to Smith that he had assigned his interest in the mortgages to the plaintiffs: *Ex parte Boulton*,

1 DeG. & J. 163, at p. 179; *Ryall* v. *Rowles*, 2 W. & T. L. C., 6th ed., at p. 874. Judgment. STREET, J.

I do not see that the question raised by the defendant, and strongly pressed upon us, that the plaintiffs and J. A. Scarlett were partners in the land as well as the brickyard business is material; if it were, I should feel no difficulty in holding that they were not partners in the land transactions, but merely co-owners.

The partnership agreement confines the partnership to the brickyard business strictly, and there is no evidence that any new arrangement was ever entered into between the parties. The only colour for the argument that a partnership in the land was created arises from the fact that the proceeds of the sales of the land were entered in the same books as those in which the brickyard transactions were kept, and were deposited to the same bank account as the moneys realized from the brickyard business. But these things do not create a partnership and they are easily explained by the fact that the shares of the parties in the land were the same as their shares in the partnership, and the book-keeper of the firm, the plaintiff E. W. Scarlett, who managed their land transactions as well, saw apparently no reason for keeping two separate sets of books where one seemed sufficient for all practical purposes.

It is further urged that because J. A. Scarlett, being on the 11th of August, 1890, the owner of the whole of the equity of redemption in lots 47 and 48, under the conveyance from J. C. Smith, made a conveyance of it to the plaintiffs, a merger of the mortgage debt was created. But, merger is a question of intention, and the intention of the parties by the assignment of the 11th of August, 1890, was plainly none other than to vest in the plaintiffs the interest as mortgagee theretofore held by J. A. Scarlett in the mortgages in question and the lands covered by them; and was certainly not to merge the mortgage debt or any part of it; the effect of the conveyance of the land must plainly be limited to the object appearing on its face, which

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leaves the whole equity of redemption still vested in J. A. Scarlett.

The plaintiffs have done nothing by which Symes street has been closed or rendered liable to be closed without the consent of the owner of the equity of redemption; its position has not been changed, and lot 48 still fronts upon it. If any change has been effected in the size or shape or situation of lots 94, 95 and 96, by any new plan, that does not affect the present case. The transactions were carried out as separate purchases, although the original negotiations embraced all five lots.

The result is that the three plaintiffs now hold the mortgage as their own, J. A. Scarlett, the fourth mortgagee, having assigned to them his original interest in it; that they so hold it free from any equity on the part of the defendant; that they have done nothing disentitling themselves to recover the mortgage money from the defendant upon his covenant, and that they are entitled to judgment against him for the mortgage debt and interest, taxes paid, and the costs of the action and motion, but upon the terms that upon payment being made they reconvey the mortgaged property to the defendant subject to such equity of redemption as may be subsisting in any person or persons other than the plaintiffs themselves.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd and 27th of November, 1895.

J. M. Clark, and *R. U. Macpherson*, for the appellants. The covenants in the mortgages are joint covenants with all the mortgagees, and not joint and several covenants, the covenants being joint in terms, and the mortgagees being joint owners of the lands: *Lane* v. *Drinkwater*, 1 Cr. M. & R. 599; *Sumner* v. *Powell*, 2 Mer. 30; R. S. O. ch. 102, sec. 6. Payment to the joint covenantee J. A. Scarlett by J. C. Smith of the mortgage moneys before the assignment of the mortgages by J. A. Scarlett to the

respondents, would have been good, and would have discharged the covenants. The purchase of the lands subject to the mortgages and the acceptance of a conveyance thereof, and the agreement by J. A. Scarlett to pay off the mortgages and protect J. C. Smith against them has the same effect as payment to one of the joint covenantees and operates as a discharge of the covenants. At any rate the covenants being joint, can be enforced only by all the joint covenantees, and when J. A. Scarlett, one of the joint covenantees, purchased the mortgaged property and assumed payment of the mortgages, he became estopped from enforcing the covenants, and thus all the covenantees were debarred from suing: *Lane* v. *Drinkwater*, 1 Cr. M. & R. 599; *Foley* v. *Addenbrooke*, 4 Q. B. 197. J. A. Scarlett could not assign his interest in the covenants to his co-covenantees, and they cannot sue without him. The evidence shews that a partnership existed as to the mortgages sued on, and J. A. Scarlett, as one of such partners, could even after the dissolution of the partnership, receive payment of a debt owing to the partnership, and give a valid release. This is in effect what he did, and the respondents are bound by his action: Lindley on Partnership, 5th ed., p. 155. The respondents took the assignments of the covenants subject to any defence or set-off against J. A. Scarlett: R. S. O. ch. 122, sec. 11; *Davis* v. *Hawke*, 4 Gr. 394, at p. 408; *Wilson* v. *Kyle*, 28 Gr. 104. J. A. Scarlett took the conveyance of the equity of redemption from Smith on the 1st of July, 1890, while he was mortgagee of the property, so that there was a merger of the mortgage, and the covenants were satisfied and extinguished: *Thompson* v. *Wilkes*, 5 Gr. 594; *Ashby* v. *Jenner*, 32 Sol. J. 576; *British Canadian Loan Co.* v. *Williams*, 15 O. R. 366. After the conveyance by the appellant to Smith of the mortgaged lands, the mortgagor was surety only for payment of the mortgage moneys as between him and the mortgagees, his grantee Smith being the principal debtor, and J. A. Scarlett one of the joint covenantees having dealt with Smith and

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made a binding agreement with him inconsistent with the mortgages, which effectually prevented the mortgagees from enforcing the covenants in the mortgages against Smith, the mortgagor was thereby released from all personal liability: *Campbell* v. *Robinson*, 27 Gr. 634; *Mathers* v. *Hellivell*, 10 Gr. 172; *Blackley* v. *Kenney*, 29 C. L. J. 108; *Muttleberry* v. *Taylor*, 22 O. R. 312; *Wheeler* v. *Brooke*, 26 O. R. 96, at p. 98. The respondents are not now in a position to reconvey the mortgaged lands to the appellant in the same condition as when the mortgages were given, upon payment of the mortgage moneys, and are consequently disentitled to sue on the covenants contained in said mortgages. In any event the respondents are entitled to recover only three-fourths of the amount secured by the mortgages, the other one-fourth, the share of J. A. Scarlett, being offset by the counterclaim of the appellant: *Galbraith* v. *Morrison*, 8 Gr. 289.

E. P. McNeill, for the respondents. The mortgages sued upon, together with several other mortgages, were taken by the respondents and J. A. Scarlett in part payment of the purchase money of lands in which their interests were joint and several; and the interests of the mortgagees in the mortgages were properly held to be joint and several: *Steeds* v. *Steeds*, 22 Q. B. D. 537. Even if the covenant sued upon is joint in form, that does not determine the question, and the instrument containing the covenant and the surrounding circumstances must be looked to to ascertain the intention of the parties: *Palmer* v. *Mallet*, 36 Ch. D. 411. After the assignment to the Farmers' Loan Company, the mortgages sued upon belonged solely to the respondents. The purchase of the mortgaged lands by J. A. Scarlett, was made by him out of the proceeds of the assignment to the Farmers' Loan Company for his own purposes, and entirely without the knowledge of the respondents, and does not affect them. The transaction between J. A. Scarlett and Smith was not viewed by the parties thereto as being a release of the liability of the appellant or of Smith to pay the mortgagee, but on the

contrary, Smith exacted a covenant from J. A. Scarlett to pay the mortgages in question. Nor did this transaction operate as a merger, that being a question of intention. The interests of the respondents and J. A. Scarlett in the lands, were those of co-owners only, and the partnership which existed between them was confined to the brick business, and even that partnership terminated long prior to the purchase by J. A. Scarlett of the mortgaged lands. J. A. Scarlett did not attempt to bind the respondents as partners or otherwise by his transactions with Smith or the appellant, and the respondents did not adopt any act of his, and therefore such act cannot afford an answer to a claim by the respondents even as partners. None of the transactions referred to in evidence, were intended to be prejudicial to the appellant, nor could the respondents by any conveyance have so dealt with Symes road as to prejudice the appellant, viewing him as a redeeming mortgagor, his title being paramount. The purchase of the lands included in the mortgages sued upon, and the mortgages themselves must be considered as transactions separate and distinct from any other transactions between the appellant and the respondents, and therefore any act of the respondents relative to lands included in other mortgages, cannot be a ground of defence in the present action. Argument.

J. M. Clark, in reply.

March 10th, 1896. OSLER, J.A. :—

A finding of fact, which seems well supported by the evidence, is that some time previous to the month of July, 1890, a division or partition had been agreed upon between J. A. Scarlett, on the one hand, and the three plaintiffs on the other, of the mortgages which had been taken to the four jointly for balances of purchase money on their land sales. This division was carried out as to J. A. Scarlett's share by the execution by himself and by the plaintiffs, at his request, of an assignment to the Farmers' Loan & Savings Company, bearing date the 8th of July, 1890, of the

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twelve mortgages which had been allotted to him, the proceeds of which he received from that company. I also think it was rightly inferred and found as a fact that the remaining mortgages, including those on which this action is brought, were, from the time of the completion of that transaction, the beneficial property of the plaintiffs free from any claim or interest of J. A. Scarlett therein, although no deed or conveyance professing to transfer such interest was actually executed by him until the 11th of August, 1890. A further finding or inference of fact in which I fully concur is that the partition of the mortgages and the assignment of J. A. Scarlett's share to the Farmers' Loan Company took place prior to the purchase by J. A. Scarlett from J. C. Smith of the equity of redemption in the lots embraced in the mortgages now in question and the execution of the covenant by Scarlett to Smith, hereafter referred to, which the defendant relies on as a defence to this action, to indemnify Smith against their payment. This deed no doubt bears date the 1st of July, while the assignment to the company is dated on the 8th of July, but the circumstances mentioned by the Chancellor and Street, J., in the Courts below point very forcibly to the conclusion that the latter instrument really preceded the former: *Trust and Loan Company* v. *Ruttan*, 1 S. C. R. 564.

I now proceed to consider the defence. The action is maintained by three only out of the four mortgagees, although the covenants for payment of the mortgage money are expressly covenants with the mortgagees jointly. It is contended (1), that the covenant being joint, all four mortgagees ought to have been parties plaintiff; and (2), whether they are so or not, that one of the joint covenantees, J. A. Scarlett, having released it or otherwise disqualified himself from enforcing it, all are equally disabled from doing so.

It appeared that in February, 1890, the defendant conveyed the equity of redemption to one J. C. Smith, who covenanted with him to assume as part of the purchase

money and to pay off the mortgages in question. In his turn—after Scarlett had ceased to have any beneficial interest in the mortgages—Smith, on the 1st of July, 1890, sold the equity of redemption to Scarlett himself, who covenanted with him, as before stated, to assume and pay them and indemnify Smith against them. The next event in order of time was the execution on the 11th of August, 1890, of the formal assignment referred to of his interest in these and other mortgages by Scarlett to the plaintiffs, and on the 1st of October, 1894, the day before the commencement of the action, the defendant obtained from Smith an assignment of Scarlett's covenant with him to pay off the mortgages. This covenant he now sets up as a defence, his counsel arguing with great force and ability that it being a defence as against one of the joint covenantees all are precluded from maintaining the action. If J. A. Scarlett were the sole covenantee this would, no doubt, be a perfectly good answer to an action at his suit on the principle stated in *Thompson* v. *Wilkes*, 5 Gr. 594, viz., that being bound to pay and also entitled to receive payment, the necessary effect of the transaction would be to extinguish the debt, just as a covenant not to sue, though not in its nature a release, is construed as such in order to avoid circuity of action. But such a transaction between the covenantor and one of several joint covenantees would not, in my opinion, any more than would a covenant by one of them not to sue, have the effect of discharging the claim upon the joint covenant and *a fortiori* where it did not take place until after the other joint covenantees had acquired, as in the present instance, the whole beneficial interest in the joint covenant. There is no actual release or satisfaction of that covenant, a circumstance which itself makes it unnecessary here to consider the true meaning and object of section 14 of the Act respecting mortgages of real estate, R. S. O. ch. 102. The parties opposed in interest are not the same, being on the one hand the covenantor and one of the covenantees in a matter collateral to the covenant, and on the other the same

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covenantor and all of the covenantees in an action upon the covenant itself. There is, therefore, no necessity for attributing to the transactions or instruments which have taken place or been executed between them any other than their true legal effect, leaving each to pursue the appropriate remedy thereon: *Hutton* v. *Eyre*, 6 Taunt. 289; *Walmesley* v. *Cooper*, 11 A. & E. 216.

If, therefore, the action had been brought in the name of all the joint covenantees as plaintiffs, I should be of opinion that no real difficulty stood in the way of their recovery. The three covenantees who are now beneficially interested have, however, sued alone, without joining J. A. Scarlett as a joint plaintiff, and the question which remains to be considered is, whether the action can be maintained as thus constituted? The covenant is not the joint covenant "implied" and "deemed to be included" in the mortgage by virtue of sections 5 and 6 of the Mortgage Act. It is, therefore, not necessary to invoke those sections in aid of its construction. It is by its very terms a joint covenant, and "there is nothing in the subject to which it applies, in the interest of the covenantees, or in the context of the instrument, to require or admit a different construction": see *White* v. *Tyndall*, 13 App. Cas. 263; *Haddon* v. *Ayers*, 1 E. & E. 118. As a rule (living the covenantees) all must join in suing upon it: *Cabell* v. *Vaughan*, 1 Wms. Saund. (1871), pp. 477, 478; *Wetherell* v. *Langston*, 1 Exch. 634, in which last case the question is very fully discussed and decided in the Court of Error. See also Dicey on Parties, 62, 72, 115. If one refused to join the remedy of the others was in equity, but at law the rule was as laid down in the case in 1 Exch. So, also, if the obligation was assigned the remedy must still have been pursued at law in the names of the original covenantees, the rule of law being that, except in the case of certain mercantile contracts, a right to sue upon a contract was not assignable by the act of the party entitled to it. And the assignee could not sue for it in equity unless the assignor refused to allow him to sue for it at law in

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his name, or had done or intended to do some act which would prevent him from recovering it in that manner: *Hammond* v. *Messenger*, 9 Sim. 327; *Jones* v. *Farrell*, 1 DeG. & J. 208, at pp. 218, 219; *Forth* v. *Stanton*, 1 Wms. Saund. (1871), p. 220. If the assignor would not permit the matter to be then tried at law, equity had a jurisdiction in the first instance to compel the debtor to pay the debt to the assignee, though not, it seems, without joining the assignor as a party: *Brice* v. *Bannister*, 3 Q. B. D. 569, 575.

There is nothing, that I am aware of, in the system of procedure introduced by the Judicature Act, or the rules of law administered by our Courts under that Act, which affects the law on this subject as administered before the passage of that Act; and, therefore, unless the plaintiffs can maintain their action under the clauses of the Mercantile Amendment Act, R. S. O. ch. 122, relating to the assignment of choses in action, which enable, and indeed require, the assignee to sue in his own name, they must fail, subject to what I have to say as to adding J. A. Scarlett as a party, because he has not in fact been made a party, nor does it appear that he ever objected to allow his name to be used as such. The case would be a plain one had all the covenantees joined in assigning the covenant to a third party who had again assigned it to the three now suing. The first assignee would have sued in his own name, had he sued at all, and the three taking by assignment from him, would properly and necessarily sue in theirs, taking no notice in either case of the original covenantees otherwise than by way of stating the derivative title. What we have here is an assignment by one covenantee of his interest in the covenant to his co-covenantees, an assignment by one of several joint creditors to the other joint creditors of his share or interest in the joint debt; and there is at first sight a difficulty in saying that such an assignment comes within the language of the 7th and 10th sections of the Act, which appear to contemplate an assignment of the entire

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debt or chose in action by the holder of it to a third person, and not a vesting of the whole interest in one joint owner by the acquisition of the interests of the others. It would, I think, be unfortunate if we were compelled to give the Act a construction which would exclude a simple case of that kind from its operation, and I think that the interpretation placed by section 6 upon the word "assignee," justifies us in holding that the case before us is brought within the Act. "Assignee," that section declares, "shall include any person becoming entitled by any first or subsequent assignment, or any * * other title, to a chose in action, and possessing at the time of action brought the beneficial interest therein, and the right to receive and to give an effectual discharge for the moneys * * thereby secured."

Now before the transaction which was completed by the assignment of the 11th August, these plaintiffs were not entitled to the choses in action in question. They were only jointly entitled thereto with J. A. Scarlett. The result of what was done, including the assignment, was that they did become entitled thereto, that is become wholly and exclusively entitled thereto, partly by reason of their own interest in it, and partly by the acquisition of that of their joint covenantee. So far they may be said to come fairly within the words of the section. Then also, they undoubtedly possessed, at the time of action brought, the beneficial interest; that is, the whole beneficial interest therein; and it is equally clear that they were then the only persons who possessed the right to receive the moneys thereby secured, and to give an effectual discharge therefor. Thus they fulfil the remaining requirements of the section, and come within its very terms as "assignees."

It is true that such an assignment to a third party by one of the joint covenantees of his interest in the chose in action would not enable such an assignee to sue in his own name, because by the conditions of the interpretation clause he is excluded therefrom; but if

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such an assignment would, apart from the Act, pass an interest if made to a third party, as it undoubtedly would, that, I think, goes strongly to shew that if its effect is to unite all the interests in the chose in action in one or more of the joint owners, it comes within the Act as being an assignment which in truth vests the whole chose in action in the assignees, so that it is no longer vested in them jointly with some one else.

For these reasons, I agree in upholding the judgment below, though I think the plaintiffs should be at liberty, if they think fit to do so, and if the requisite consent can be obtained, to add J. A. Scarlett as a party plaintiff, making the necessary amendments in their pleadings.

I agree with the judgment appealed from that J. A. Scarlett and the plaintiffs were not partners in these land transactions, but in the brick business only.

The question of the closing of Symes street I am quite unable to regard as having any real bearing upon the issues in the action. Nor have I thought it necessary to consider whether any other defences might be suggested arising out of the complicated transactions between the parties. I have confined myself to the questions raised on the pleadings and argued on the appeal.

MACLENNAN, J. A. :—

This is an action upon the covenants contained in two several mortgages made by the defendant to the plaintiffs and one J. A. Scarlett for payment of the mortgage debts. The circumstances are precisely the same with respect to both mortgages and the covenants contained therein, so that the case may be regarded as if there had been but one mortgage. Four persons, of whom the plaintiffs were three, and J. A. Scarlett the fourth, sold and conveyed the mortgaged land consisting of two building lots, numbers 47 and 48, respectively, to the defendant; and the defendant gave the mortgages in question, one upon each of the lots, for $600, parcel of the purchase money. The mortgages are

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made in pursuance of the Act relating to Short Forms, and the covenant for payment is in the form contained in that Act. Each mortgage is expressed to be in consideration of $600 paid by the mortgagees to the mortgagor; and there is nothing whatever in either instrument to indicate that the interest of the mortgagees was other than a joint interest, or that the covenants are or were intended to be other than obligations to the plaintiffs jointly. Therefore, having regard to R. S. O. ch. 102, secs. 6 and 14, and, indeed, irrespective of those sections, the covenants in question were and are covenants with all the mortgagees jointly and not otherwise: *Slingsby's Case*, 5 Rep. 18 (*a*); *Eccleston* v. *Clipsham*, 1 Wms. Saund. (1871) 162; *Foley* v. *Addenbrooke*, 4 Q. B. 197; *Palmer* v. *Mallet*, 36 Ch. D. 411; *White* v. *Tyndall*, 13 App. Cas. 263.

The action is by three only of those covenantees, and the excuse for not joining the fourth, John A. Scarlett, is that by deed dated the 11th of August, 1890, John A. Scarlett assigned all his interest in the mortgages and in the covenants contained therein, and the money secured thereby, to the plaintiffs. But for that assignment it would be clear that the plaintiffs could not maintain the action in the absence of John A. Scarlett. That is well settled law, independently of the Judicature Act; and *Kendall* v. *Hamilton*, 4 App. Cas. 504, decides that that Act has made no difference. See also *Roberts* v. *Holland*, [1893] 1 Q. B. 665, 667. Then does the assignment by the one mortgagee to the others excuse his absence? That depends on the Mercantile Amendment Act, R. S. O. ch. 122, section 6 and following sections. Section 7 of that Act declares that such a debt as this is assignable by any form of writing; and the assignee shall sue thereon in his own name. This debt or chose in action was a single indivisible thing. It has not been assigned. The three plaintiffs have assigned nothing, and John A. Scarlett had not the debt to assign. It was not his debt, it was the debt of the four. I think, however, the assignment ought to be held to be within the Act, and to be good. It is evident the thing the parties

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intended to do could be done. The four could have assigned to a fifth person, a stranger; and he could have assigned to the three, and no objection could be urged to that. Then what the statute says is, that a debt may be assigned by any form of writing. Here the writing expresses the intention of the parties, that the debts which theretofore belonged to the four, should thereafter belong to the three. I think that intention, expressed in writing, is a sufficient assignment of these debts from the four to the three, and that *primâ facie* the plaintiffs are entitled to recover.

It is said, however, that before the assignment in question of the 11th of August, a defence had accrued to the defendant in respect of the debt, which is saved to him, notwithstanding the assignment, by virtue of section 11 of the Mercantile Amendment Act, and that is the farther question in the appeal.

I will first consider the alleged defence apart from the land, for the action is a purely common law action on the covenant, and may perhaps be barred, although the debt may still continue to be a good charge upon the mortgaged lands. The defence is, that after the covenant was made, and on the 8th of February, 1896, one J. C. Smith covenanted with the defendant to pay the debt and to relieve the defendant therefrom; and that afterwards on the 1st of July, 1890, John A. Scarlett, one of the mortgagees, covenanted with Smith to pay the debt, and to relieve Smith from the payment thereof. It is said that the effect of these last two covenants was that the defendant's covenant was extinguished as between him and John A. Scarlett, one of the covenantees; and that, being a joint obligation, it became extinguished for all purposes; and the question is, whether that is so. John A. Scarlett's covenant was not with the defendant but with Smith. At common law, and before the statutes of set-off, mutual debts did not extinguish each other. If A. owed B. £100, and B. owed A. a like sum, both debts remained good, and it required mutual consent to discharge the one by means

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of the other; and even after the statutes, it was optional with a defendant to claim a set off. Much less was a debt discharged by a covenant made by the creditor with a third person; and as I understand the law as it stands to-day, mutual debts between the same parties do not *ipso facto* discharge or extinguish each other without consent, or without being pleaded, but are still both at law and in equity separate and distinct causes of action. If that is so, then John A. Scarlett's covenant with Smith had no effect either at law or in equity upon the right of action by the mortgagees against the defendant upon the covenant for the payment of the mortgage debt. The mortgagees could sue the defendant, and all the defendant could do was to sue Smith, who in his turn could sue John A. Scarlett upon his covenant. Then how is the case affected by the assignment made by John A. Scarlett to the plaintiffs? Suppose there had been no such assignment, it is clear that the debt was not *ipso facto* extinguished by John A. Scarlett's covenant with Smith; and the four could, therefore, still maintain their action. It follows that John A. Scarlett's assignment to the plaintiffs left the covenant still in its integrity; the only difference being that thereby it became the property of the three instead of the four. It is the same covenant, but it is now owned by the three plaintiffs. If the defendant could not set up the covenant with Smith against the four, no more can he do so against the three.

The defendant, however, has another defence. On the 1st of October, 1894, he obtained an assignment of John A. Scarlett's covenant with Smith. This was on the day before the present action was commenced, and after the assignment by Scarlett to the plaintiffs. The defendant does not plead that when he took this assignment he had no notice of the assignment from John A. Scarlett to the plaintiffs, nor does he offer any evidence of such want of notice. To enable him to take advantage of a defence arising after that assignment, I think he ought to plead and prove want of notice. *Primâ facie* the assignment

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is good, unless he had no notice of it. I think, therefore, the defendant can claim no benefit from that assignment if otherwise it would have benefited him. But even if he had no notice, I do not see how that assignment would be a defence. He might plead it as a counterclaim: *Manchester R. W. Co.* v. *Brooks*, 2 Ex. D. 243; but that would merely enable him to get judgment against John A. Scarlett just as if he sued him in a separate action. But he could not plead it as a set-off to defeat the action, because the plaintiffs' claim is joint, and the covenant sought to be pleaded is the several obligation merely of one of the plaintiffs, and is not the subject of set-off: *Arnold* v. *Bainbrigge*, 9 Ex. 153; *Gordon* v. *Ellis*, 2 C. B. 821; *France* v. *White*, 8 Scott 257; *Bowyear* v. *Pearson*, 6 Q. B. D. 540; Lindley on Partnership, 5th ed., pp. 269, 291, 294, 660; 1 Chitty on Pleading, p. 571. Therefore if the question was concerning the defendant's covenant, considered wholly apart from the land, I see nothing in the case which is sufficient either at law or in equity to discharge the defendant.

Then does it make any difference that this is a covenant to pay money lent, or a balance of purchase money secured by mortgage? The covenant by Smith to the defendant was given as part of the consideration for a sale to him of the lots comprised in the mortgages; and the covenant by John A. Scarlett to Smith was in like manner in consideration of a sale and conveyance to him of the same lands.

The transaction between Smith and the defendant was on the 8th of February, 1890, and that between Smith and John A. Scarlett was by deed dated the 1st of July, 1890. It is this last deed which is relied upon as discharging the mortgage. It is a deed of sale of the mortgaged lands by Smith to Scarlett. It is expressed to be made in consideration of the mortgages thereinafter mentioned, and of $1,800 of lawful money, and it grants the land to John A. Scarlett in fee, "subject to mortgage encumbrances to the amount of $1,200 now registered against the said lands, which mortgage encumbrances the said party

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of the third part (the grantee), assumes and agrees to pay off and discharge as part of the consideration money, and interest thereon from the date hereof."

It is argued very forcibly that this transaction between the mortgagee and the owner of the land extinguished the debt; that Smith was the owner of the land, and the person whose duty it was to pay the debt; that that duty was apparent from the very form of the transaction; that John A. Scarlett being himself mortgagee, and a person entitled to receive and discharge the debt, the agreement could mean nothing else than actual satisfaction. The money is expressed to be part of the purchase money, and the hand to receive and the hand to pay being the same, the effect is in law payment. The principal money was not then due, but he in effect retained in his hands, and so received in advance, actual money for the purpose of payment. No doubt one of several joint obligees may receive payment or satisfaction, and discharge the obligation without reference to his co-obligees. He may even do so in fraud of his co-obligees; and if the debtor making payment has no notice of the fraud, he is free, but if he have notice, such a discharge is invalid in a Court of equity, and, since the Judicature Act, in any Court.

If John A. Scarlett had been sole mortgagee there would be great, perhaps irresistible, force, in the defendant's contention; and such cases as *Thompson* v. *Wilkes*, 5 Gr. 594; *Ashby* v. *Jenner*, 32 Sol. Jour. 576, and *British Canadian Loan Co.* v. *Williams*, 15 O. R. 366, would be applicable. John A. Scarlett, however, was only one of four mortgagees. He was acting for himself, buying the land for himself. The mortgage money would not be due for nearly four years, and he did not want to pay the money until it became due in the regular course. His co-mortgagees also might not be willing to receive it in advance. He did not wish to defraud them by releasing a security which was theirs as well as his for a consideration in which they were not concerned, but which was his alone. Therefore he does not acknowledge payment

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and release the mortgage, but he takes his deed subject to the mortgage. He assumes it and agrees to pay it off and discharge it with interest from that time. All that shews that it was not the intention of this deed, and that it is not its meaning and effect, that thereby the mortgage debt should be satisfied as between Smith and his vendee; but on the contrary, its clear meaning is that the mortgage was to continue to all intents and purposes; and that Smith should be protected by his vendee's covenant alone. I think that is the proper construction of the deed, and it is a construction consistent with honest dealing on the part of Scarlett, while the other construction contended for would not be so.

It was also contended that Scarlett being a mortgagee and taking a conveyance of the equity of redemption, there was a merger, and that for that reason the debt became extinguished. I think that argument is sufficiently answered by saying that merger is a question of intention, and that here the intention was manifestly otherwise. But besides, the legal title was not in John A. Scarlett alone, it was in the four mortgagees, and the equity of redemption added nothing to the legal title which he had before. There was the legal title on the one hand, and then there were the equitable rights of the parties which they had defined by the deed. Now, if as between themselves, John A. Scarlett and Smith did not extinguish the mortgage debt, but kept it on foot, it continued to be alive against the defendant also, unless there is some equitable ground on which he can claim to be discharged.

I am unable to see that there is any such ground. If Scarlett had gone to the defendant while he was still the owner of the land or afterwards, and had proposed to him to release the debt for some private consideration to himself, as for example, in payment of his individual debt, it is clear that such a release would not be binding on the other mortgagees, but the defendant would still be liable to them. It is quite plain, therefore, that the transaction between Smith and John A. Scarlett had no effect legal or

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equitable in relieving the defendant. If he pays the debt he has a right to get a reconveyance of the estate from the mortgagees, and to foreclose John A. Scarlett if he does not redeem, and none of the matters which have hitherto been noticed have in any way impaired the mutual rights of foreclosure and redemption.

If I had come to a different conclusion on these points I should, I confess, have had great difficulty in agreeing with the Courts below, in holding that John A. Scarlett had ceased to have an interest in the mortgages in question before the deed he obtained from Smith. I do not find any evidence that the conveyance from Smith to Scarlett was not executed on the day of its date, the 1st of July; and I think it cannot be inferred from the later date of the affidavit of execution that it was in fact executed on a later day.

There was still another defence set up on behalf of the defendant. It was that after John A. Scarlett became the owner of the equity of redemption, he and the plaintiffs concurred in closing up Symes's road adjacent to one of the mortgaged lots, and had dedicated as a highway or street called Henriod street, thirty feet of three other lots sold by them to the defendant at the same time as the lots in question. The contention was that the plaintiffs, by reason of those acts, have parted with a substantial part of the property mortgaged, and not being able to reconvey the whole upon redemption, can no longer sue for the mortgage debt: *Gowland* v. *Garbutt*, 13 Gr. 578. With regard to Henriod street, it has nothing to do with the land in question at all, however the acts complained of may affect the mortgages upon lots 94, 95 and 96. And as to Symes's road, the conveyance is made expressly subject to all rights of way over the same. If it was a public street, the conveyance has not deprived it of that character, and I do not see how it helps the defendant.

I think that the appeal should be dismissed.

HAGARTY, C. J. O.:—I am of the same opinion.

BURTON, J.A. :—

Judgment.

BURTON, J.A.

In this case I fully agree with my brother Maclennan, that all the grounds of defence fail and that the appeal should be dismissed if this case falls within the Mercantile Amendment Act as to the assignment of choses in action, R. S. O. ch. 122. Upon that one point, with every desire to agree, I find myself unable to bring my mind to that conclusion. I think it clear that the covenants in question were joint covenants, and unless a change has been effected by the Judicature Act, or the Act I have already referred to, any action must be brought in the joint names of the four joint covenantees.

The rule in equity referred to by my brother Street, citing *Steeds* v. *Steeds*, 22 Q. B. D. 537, can, I think, have no application in the face of our own statute, R. S. O. ch. 102, which provides that (section 6): "Where there are more mortgagees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums."

And again (section 14): Where an obligation for payment of money is made to more persons than one jointly, and not in shares, the money for the time being due to those persons shall be deemed to be and remain money belonging to those persons on joint account as between them and the obligor.

Nothing can be clearer than that at common law any action to recover the amount would necessarily have to be in the names of all the covenantees, even though one of them had assigned all his interest in the covenant to his co-covenantees.

In this case John A. Scarlett did profess to assign all his interest in the covenant to his co-covenantees.

Here the covenant is in terms undoubtedly joint, and the rule laid down by Pollock, C. B., in *Keightley* v. *Watson*, 3 Ex. 716, seems to be as good law at the present day as when it was pronounced. "If a covenant," he says,

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"be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, though the interest be several, all the parties must be joined in the action."

Here the covenant is not only unmistakably joint but the interest of the covenantees was also joint.

How, then, is this affected by the Mercantile Amendment Act?

That Act provides (section 7) that "every debt and chose in action arising out of contract shall be assignable by any form of writing, * * and the assignee thereof shall sue thereon in his own name in the action, and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any Court in this Province."

Here there was no debt due to the assignor, John A. Scarlett; the debt was entire and indivisible to himself and three others, the present plaintiffs.

Suppose this assignment had been to a stranger, it might well pass his beneficial interest; but before the statute it would be confined to that, and it is submitted that the statute has effected no change in that respect; the action would still have to be brought in the names of the original covenantees. Can it make any difference that the assignment was made to the other covenantees? I think, with great submission, that it could not.

I have read the clauses of the Mercantile Amendment Act very carefully and with a desire to find something in it which would enable me to assist the plaintiffs, but can find nothing which, in my opinion, can do so.

Section 6, which defines who may be an assignee under the Act, does not, I think, assist, because it must be read in connection with the other sections of the Act, which shew that the chose in action made assignable by the Act must be one in which the assignor or assignors have the entire property. In such a case the first or subsequent assignment passes the property so as to give the assignee

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the full legal title and right to sue in his own name, but even then he must, at the time of suit, have the beneficial interest. I think that section intended merely to shew that choses in action within the purview of this Act are to be assignable so as to give the right to the first or any subsequent assignee to sue in his own name. I am most anxious to see my way to granting relief to the plaintiffs in this case, but I am unwilling to place a construction upon the statute which I think it does not bear, and may lead hereafter in other cases to trouble which we cannot at present foresee.

The interest which the assignor purported to transfer was not the debt or chose in action mentioned in the statute, but his equitable and beneficial interest in it, the legal title remaining in himself and others as before, and so, as it seems to me, it does not fall within the statute.

My learned brother suggests that the end might have been attained by an assignment of the debt by the holders, the four, to a stranger, and then a transfer to the three. Possibly so. The answer to it is that it has not been done. It might, perhaps, with equal force be said if a transfer of a debt had been made orally, and it was objected that it did not come within the Act, that if it had been made by any form of writing it would have been good. In such a case the thing the parties intended to do could be done, and yet, as the statute had not been complied with, it would not be competent to any Court to hold the transfer good within the Act so as to pass the right of action to the assignee in his own name. I think it remains as it would have been before the passing of the statute and that the action must necessarily be in the joint names.

I am pleased to think that my learned brothers think the difficulty may be gotten over.

Appeal dismissed, BURTON, J.A., *dissenting.*

Journal Printing Company v. Maclean.

Defamation—Libel—Incorporated Company—Damages—Evidence—Miscarriage—Con. Rule 791—New Trial—Estoppel.

An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business.

South Hetton Coal Co. v. *North Eastern News Association*, [1894] 1 Q. B. 133, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, approved.

If the judgment of a Divisional Court directing a new trial is not appealed against the questions determined by it cannot be reopened upon an appeal from the judgment at the second trial.

It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question.

It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiffs' business, but the Court refused to interfere because of the admission of the opinion of one witness, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages and the damages allowed were small.

Judgment of the Queen's Bench Division affirmed.

Statement.

This was an appeal by the defendant from the judgment of the Queen's Bench Division.

The plaintiffs, who were a company incorporated by Letters Patent under the Ontario Joint Stock Companies Letters Patent Act "to publish a newspaper or newspapers and to carry on a general newspaper, lithographing, printing, book-binding, and job printing business," brought the action to recover damages for libel.

The defendant in the year 1893 was an alderman of the city of Ottawa and was re-elected at the municipal elections in January, 1894. The libels complained of were thus set out in the statement of claim:—

On or about the 6th day of January, A. D. 1894, the defendant wrote and caused to be printed and published in the *Daily Citizen*, a newspaper published at the said city of Ottawa, an address entitled "To the Electors of Victoria Ward," in the course of which he falsely and maliciously wrote and caused to be printed and published of and concerning the plaintiffs and in relation to their trade and business as publishers of the said *Evening Journal* newspaper, the words following, that is to say:—

"I have had the distinction and gratification of being just the object of abuse from the grand army of cranks led by a journal (meaning the plaintiffs) which, on the confession of its moving spirit, reports favourably or adversely at ten cents a line; that comes to the front with every discarded economic fallacy that it finds lying around, and has ridden to exhaustion every crude and vicious hobby from equal rights down to sawdust in the river." The defendant meant thereby and imputed that the plaintiffs in the conduct of their trade and business as publishers of the said newspaper habitually misrepresented facts in the columns of the said newspaper for unlawful gain, hire or reward, with intent thereby to defraud and deceive the public, and were guilty of fraudulent and dishonest practices. Statement.

In the course of the said address the defendant further falsely and maliciously wrote and caused to be printed and published of and concerning the plaintiffs and in relation to their trade and business as publishers of the said *Evening Journal* newspaper, the words following, that is to say:—"The verdict of the electors of Victoria Ward is for me sufficient assurance that an intelligent people may be successfully appealed to against the declamation of the cranks and the calumnies of an ignorant, prejudiced and corrupt press (meaning thereby the plaintiffs). I will probably be answered as on former occasions with false assumptions and conclusions, or with childish prattle that it mistakes for what, since the literary era of Artemus Ward, has been called 'sarkasm.'" The defendant meant thereby and imputed that the conduct by the plaintiffs of their trade and business as publishers of the said newspaper was characterized by ignorance and prejudice and that the plaintiffs conducted their said business in a fraudulent, dishonest, depraved and perverted manner from unlawful and improper motives, and were, therefore, unworthy of public confidence.

In the course of the said address the defendant further falsely and maliciously wrote and caused to be printed and published of and concerning the plaintiffs, and in relation

Statement.

to their trade and business as publishers of the said *Evening Journal* newspaper, the words following, that is to say:—"The *Journal's* position. The election of Monday last affords a lesson to a prostitute press (meaning thereby the plaintiffs.) The candidates, from those for the mayoralty down, whom the *Journal* (meaning thereby the plaintiffs) took especially under its patronage were summarily rejected, and those whom it (meaning thereby the plaintiffs) went especially out of its way to prejudice, were accepted as with a certificate of good character by the electors." The defendant thereby meant and imputed that the plaintiffs in the conduct of their trade and business as the publishers of the said newspaper habitually offered themselves to base and infamous purposes, and devoted their said newspaper to unworthy, low and indiscriminate uses, unlawfully, improperly and for hire, gain or reward, and were unworthy of public esteem and confidence.

And the allegation as to damage was as follows:—

By reason of the publication by the defendant of the said libellous statements, the plaintiffs have been and are greatly prejudiced and injured in credit and reputation in the conduct of their business as aforesaid, and have been otherwise damnified.

The action came on for trial on the 14th of March, 1894, at Ottawa, before FALCONBRIDGE, J., and a jury, when it was dismissed with costs on the ground that the plaintiffs could not maintain such an action. This judgment was reversed by the Queen's Bench Division on the 8th of June, 1894, and a new trial ordered. See 25 O. R. 509. The action came on again for trial on the 15th of September, 1894, at Ottawa, before FERGUSON, J., and a jury, but the jury disagreed, and it then came on a third time for trial on the 16th of January, 1895, at Ottawa, before BOYD, C., and a jury, when a verdict was found in favour of the plaintiffs for $200 damages, and judgment was given for that sum with costs. At this trial one of the witnesses for the plaintiff was asked whether in his opinion the state-

ments complained of were likely to be injurious to the business interests of the plaintiffs, and he and other witnesses were also asked who were aimed at by the article, and as to the meaning of some of the expressions used. There was no allegation in the statement or claim of special damage, and no evidence of special damage was given. An application to the Queen's Bench Division to reverse this judgment or for a new trial was dismissed. Statement.

The defendant then appealed and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th and 29th of January, 1896.

McCarthy, Q.C., and *Stuart Henderson*, for the appellant. The statements complained of do not refer to the plaintiffs, and if libellous at all are made in reference to the newspaper and not to the company, and would only be actionable if followed by special damage. An example of the distinction may be seen in *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11, and the rule is referred to in Odgers' Law of Libel, 2nd ed., pp. 29, 81, 133. Unless special damage is done there must be a charge of personal misconduct or wrong doing. This is a mere attack on the newspaper, the property of the plaintiffs, and may or may not depreciate the value of the newspaper and thus indirectly injure them, but there is no necessary implication of damage and, therefore, evidence of special damage must be given. The principles laid down in *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, apply and shew what must be proved. See also *Evans* v. *Harlow*, 5 Q. B. 624. There may, of course, be a libel both on the person and on the property: *Ingram* v. *Lawson*, 6 Bing. N. C. 212, and it is very difficult to draw the line: see *Hart* v. *Wall*, 2 C. P. D. 146. If, however, it can be held that the charges refer to the plaintiff company they are charges of corruption and a company cannot be guilty of corruption, so that such a statement is not actionable: *Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 87; *Mayor of Manchester*

Argument.

v. *Williams*, [1891] 1 Q. B. 94. *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133, will be relied on, but that was a very different case. There the libellous statements were made as to the real estate of the company. At all events the present judgment cannot stand for there was improper admission of opinion evidence as to the person aimed at. Evidence of facts and circumstances is admissible, but the jury must draw the inference as to the person meant. It is true that it has been the common practice to allow questions of this sort, and it is said in Starkie on Slander, 3rd ed., p. 452, that it is proper to ask such questions, but there is no authority for that statement, and in *Eastwood* v. *Holmes*, 1 F. & F. 347, there is a distinct holding the other way. In Odgers' Law of Libel, 2nd ed., p. 567, the statement is made very much as in Starkie, but the authorities cited do not support the text, and the American authorities take the contrary view : *Rangler* v. *Hummell*, 37 Pa. St. 130. Opinion evidence was also allowed as to the effect of the allegations on the business of the company while this was entirely a matter for the jury. Evidence was also admitted as to the meaning of some of the words used in the address, but this cannot be done unless the words have some hidden or local meaning, and nothing of that kind is contended here: *Daines* v. *Hartley*, 3 Exch. 200 ; *Huber* v. *Crookall*, 10 O. R. 475 ; *Simmons* v. *Mitchell*, 6 App. Cas. 156. It cannot be said that substantial wrong has not been done by the admission of this evidence, or that the same result would have been arrived at without it, and Rule 791 does not justify the refusal of a new trial: *Bank of Hamilton* v. *Isaacs*, 16 O. R. 450 ; *Pickup* v. *Thames, etc., Ins. Co.*, 3 Q. B. D. 594; *Shapcott* v. *Chappell*, 12 Q. B. D. 58.

Aylesworth, Q.C., and *G. F. Henderson*, for the respondents. It is too late now for the defendant to contend that the action will not lie; that point was determined adversely to the appellant by the Queen's Bench Division on the former application, and their judgment was not appealed against and is now binding: *Grand Trunk R. W.*

Co. v. *McMillan*, 16 S. C. R. 543, at p. 560; *McGee* v. *Kane*, 14 O. R. 226, at p. 233; *Peareth* v. *Marriott*, 22 Ch. D. 182. But if the point is open there is nothing in it. The intention of the article is plain. It refers wholly to the management of the newspaper and to the spirit in which it has been carried on. The defendant himself identifies the plaintiffs as the subject of the attack and it is absurd to say that any wrong has been done by asking a witness who in his opinion was aimed at. *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133, is directly in point on the main question and it recognizes most clearly that the company has a reputation to defend. There was no miscarriage and there is no ground for a new trial. There is ample evidence without that objected to to support the verdict, and the attention of the jury was called to the fact that they were to decide as to the damages. Argument.

Stuart Henderson, in reply.

March 10th, 1896. HAGARTY, C.J.O.:—

I fully agree in the result of my learned brother Osler's judgment, which I have had the opportunity of reading. There is only one point on which I desire to remark.

Whether the question to which Mr. McCarthy chiefly argued was in itself a proper question or not, it appears to me to be clear that under the wholesome provisions of the statute we must not allow it to affect the verdict at the trial or the judgment thereon under appeal. The Chancellor, on objection, allowed the plaintiffs' manager to be asked what effect the statements made by the defendant would have on the business of the company. He answered generally that allegations that a newspaper could be bought must injure its business.

The objection seems to be that his opinion would be both worthless and an usurpation of the functions of the jury. In his careful charge to the jury the case was left at large to them; no weight or reference whatever was

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HAGARTY, C.J.O.

made to the editor's opinion. That he and the proprietors of the company thought they were libelled in a manner injurious to their business was, we assume, patent from the fact of their bringing this action.

I am not prepared to say that a question should be, at once, as a matter of law, refused. The answer might shew that it was proper and important. The witness might be able to shew that some of the charges might be specially injurious to the company, if, as we may suppose, the paper was established as the special organ of some party or religious body, and chiefly supported by such party or body, and that the libel specially bore on the paper's course or its advocacy of principles hostile to the cause it was bound to support. I cannot see why such testimony would not be relevant and admissible. If the answer was, as here, simply a mere expression of the witness's opinion, it amounted to nothing and would be so treated, and the case here was left at large to the jury as the sole and ultimate judges. Personally, I feel that we hear far too much of these objections to questions, especially on the point of denying the right to ask a witness his opinion on the meaning or bearing of words spoken or written, or of his opinion as to the state of a road being dangerous, or that a vehicle was going at a dangerous speed, etc., etc. A slight change in the wording of the question can generally avoid the legal objection and elicit the answer desired. In many cases it is absolutely necessary to ask a witness's (not an expert's) opinion—as to whether a paper or note was in the defendant's handwriting—as to identity, etc., etc. Of course the result must depend on the jury's opinion, not that of the witness who deposes to the facts.

Giving the defendant here the benefit of his objection to the question, I think the statute fully meets the case. In the late case of *Bray* v. *Ford*, [1896] A. C. 44, in the Lords, the decision of the Court of Appeal was reversed. In a libel suit charging an improper claim and receipt of costs by one in a fiduciary position, the trial Judge directed the jury that the plaintiff had a right to the costs. The

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Court of Appeal held that the direction was wrong, but that under the statute no substantial wrong or miscarriage was thereby shewn. This ruling was held erroneous by the Lords; that the ruling was on an important and serious point and that it was impossible to speculate as to its effect on the jury, who found a large verdict for the plaintiff; that it was calculated to lead them to take an erroneous view of a material part of the alleged libel.

This decision must strike every one as undoubtedly right. I refer to the case chiefly as shewing the liberality of the three learned Judges in the Court of Appeal, the Master of the Rolls, and Lopes and Rigby, L.JJ., in construing the statute. I can hardly conceive that, if the point had been the same as in our case, there would have been any doubt as to the curative efficacy of the statute.

BURTON, J.A.:—

I entirely agree with the judgment prepared by my brother Osler, and I should not have thought it necessary to add anything but for a doubt which has been expressed as to the admissibility of the evidence of the manager of the paper as to the probable effect or tendency of the libel on the plaintiffs' business, and I should regret if my reticence should be regarded as an acquiescence in that view. I cannot say that I have the slightest doubt that the evidence was properly objected to and was improperly received. It was not evidence. It was the expression of a witness upon a point on which the jury alone were the proper parties to decide, and it is unfortunate that it was admitted, because it imposes upon the Court the difficulty of deciding whether some substantial wrong or damage may not have been occasioned by the admission of the evidence.

It is a most difficult thing to say what influence that evidence may have had in the assessment of the damages, and if parties will press for the admission of improper evidence they have only themselves to blame if

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BURTON, J.A.

a Court afterwards refuses to say that it is not satisfied that a substantial wrong has not been done. No better illustration, perhaps, could be found of the difficulty of construing the rule than is afforded by the recent case of *Bray* v. *Ford*, [1896] A.C. 44, where three Justices of Appeal, notwithstanding that they held that there had been misdirection on the part of the learned trial Judge, in consequence of which ruling the defendant was not permitted to present his case to the jury with the argument that his original complaint was true, and notwithstanding that the verdict was a large one, came to the conclusion that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned Judge had been the other way.

Lord Herschell, in the House of Lords, distinctly disapproves of this way of dealing with the case, and he refers to it in this way: "In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the Court think that the verdict of the jury is in accordance with the true view of the facts, * * it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury."

He then refers to that being an action for libel where the parties have not only a right to trial by jury but the assessment of damages is peculiarly within their province, and that it would often be impossible to say that the verdict was a wrong one whether the damages were assessed at £500 or £1,000. And he then proceeds: "Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the rule. The Court may think, as I might think in the case before your Lordships, that the

jury would have given the same damages if the law had been correctly expounded; but this is a mere matter of speculation: it cannot be asserted with the least certainty that they would have done so."

Judgment.

BURTON, J.A.

The same reasoning applies where evidence is improperly received.

I have always felt, therefore, that in the great majority of cases of this kind, how purely speculative our conclusion is when we take upon ourselves to refuse the relief to which the party would have been entitled as of right before the rule.

In the present case, beyond the one question and answer, the objectionable evidence was not pressed, and the amount of the verdict is not large.

One Court has held that no substantial wrong or miscarriage has been occasioned, and although I do not quite agree in the reasoning, I cannot say that the conclusion is so manifestly wrong that we should be justified in interfering.

I concur, therefore, in dismissing the appeal.

OSLER, J.A.:—

At the trial before the Chancellor a witness who had read the address on the morning of its publication was asked if he had formed any opinion as to who was aimed at in that part set forth in paragraph three. He answered: "I concluded that Mr. McLean meant the Journal.

When you say the Journal, what do you mean by the Journal? I mean the Journal as an entire institution, the Journal as a newspaper and publishing company.

That is the Journal as published by the plaintiff company? Yes."

The witness gave similar evidence as to paragraphs four and five, saying that he judged when he read them that they were aimed at the plaintiffs. He formed his opinion from his knowledge of municipal affairs; from the refer-

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OSLER, J.A.

ence in the article to the Journal, and from the fact that the plaintiffs' newspaper was the only one that had opposed the defendant in the election campaign. There was also evidence identifying the plaintiffs as the parties pointed at by the article in the allusions to "equal rights" and "sawdust in the river."

The defendant's counsel objected that the witness could not properly be asked his opinion as to who was aimed at by the article in the paragraphs complained of. As to damages, the witness was asked in substance his opinion as to the effect the libel would have upon the plaintiffs' business—as to its tendency, and he answered that it would have a tendency to injure it. This was also objected to on the ground that there being no special damage laid and no attempt to prove any actual loss evidence that the libel had a tendency to injure the plaintiffs' business was improper, as it was the province of the jury to say what general damages should be given, if any, and to form their own opinion from the facts proved as to the tendency of the libel.

It was further contended (1) that the plaintiffs, a corporation, could not sue in respect of these libels, at all events, without alleging and proving special or actual pecuniary damage; (2) that the plaintiffs, the corporation or company by which the Journal newspaper was published, were not referred to by the article, but only their property or the newspaper itself, and that the only action the plaintiffs could maintain was one in the nature of slander of title, in which proof of special damage was essential to the right of action.

Substantially there are but three questions involved in the appeal:

(1) Whether, under the circumstances, such an action as this will lie at suit of a corporation;

(2) Whether evidence has been improperly admitted; and, if so,

(3) Whether it can be said that any substantial wrong or miscarriage in the trial of the action has been thereby

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OSLER J.A.

occasioned so as to make it necessary or proper not to act upon the rule but to grant a new trial.

On the first point it might be enough to say that for the purpose of the present action it was decided on the motion to set aside the non-suit at the first trial. There was no appeal from that decision, and as between these parties it may be said that the question is *res judicata*: *Grand Trunk R. W. Co.* v. *McMillan* 16 S. C. R. 543, at p. 566. But as it has been fully argued it may be proper to express an opinion upon it. It is, in my opinion, covered by the judgment of the Court of Appeal in the *South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133; where it was held that an action would lie at the suit of an incorporated trading company (which these plaintiffs are) in respect of a libel calculated to injure their reputation in the way of their business. The authorities are fully reviewed. It is pointed out by Lord Esher that the law of libel is the same as to all plaintiffs, corporation, company or individual. Whether the statement complained of is libellous depends on the same question, viz., whether the jury are of opinion that it would tend in the minds of ordinary people to bring the plaintiff into contempt, etc., or to injure his character or business. In the case of the company or corporation, the conditions may not exist which would make a particular statement—libellous as to an individual—libellous as to them as, *e.g.*, a statement imputing some personal delinquency, such as arson, adultery, or, in certain senses of the word, corruption. The law is the same but the application of it is different, and a corporation is incapable, in the nature of things, of being the subject of some kinds of imputation. "There are other statements," says Lord Esher, "which would have the same effect, whether they were made with regard to a person, or a firm, or a company; as, for instance, statements with regard to conduct of business. * * * With regard to a firm, or a company, it is impossible to lay down an exhaustive rule as to what would be a libel on them. Statements may be made with regard to their mode of

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OSLER, J.A.

carrying on business, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently. If so, the law will be the same in their case as in that of an individual, and the statement will be libellous. Then, if the case be one of libel, whether on a person, a firm, or a company, the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case." In the present case, assuming that the libels were published of the plaintiffs, as the jury have found, they are undoubtedly capable of the innuendoes—the meanings—attributed to them by the pleader. Statements as to the manner in which the proprietors of a newspaper conduct it, the purposes they serve by it, the principles they advocate in it, and the depraved or dishonest methods and motives which characterize it, are, or may well be, calculated to injure them in respect of their business. Again, there are corporations *and* corporations: as to some corporations such statements would have no more meaning or application than, *e.g.*, a statement of a municipal corporation that it was guilty of corrupt practices: *Mayor of Manchester* v. *Williams*, [1891] 1 Q. B. 94, but the conditions which obtain as to the publishers of a newspaper, in the nature of the property, and the character of the paper, are peculiar. The reputation of the newspaper is their own business reputation, and questions of motives and morals, and methods of dealing with matters of public interest, as manifested in the thing put forth by them to the public, must necessarily enter largely into the consideration of whether what is said of them in relation to their business as publishers of the paper is, or is not, libellous. A company illustrating in the conduct of their newspaper the principles and methods of the Eatanswill Gazette would probably thrive but meagrely in circulation and advertising in a respectable community. I agree with the judgment of the learned Chief Justice Armour on this branch of the case, as reported in 25 O. R.

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OSLER, J.A.

509. What I have said applies as well to the fourth paragraph, which was more particularly the object of attack, as to the rest of the libel.

Then as to the improper reception of evidence as to the application of the libel—as to whom it was aimed at. It was strongly argued that this was nothing but evidence of opinion and ought not to have been admitted. I think the evidence went much further than this and that facts and circumstances were proved quite sufficient for the jury to find as they did. But even as to the opinion of the witness, nothing was admitted which has not been admitted in hundreds of cases, or that had not its warrant in a long and, so far as I know, an unbroken course of practice adopted and followed almost from the necessity of the case. The writer of a libel is often careful so to frame it, as, though the person attacked is not actually named, to enable any one who knows anything of the circumstances to identify him as easily and readily as if he were. In Starkie on Slander, vol. 2, p. 275, Wendell's ed. of 1843, from the 2nd English ed. of 1830, it is said : " It is always a question for the judgment and opinion of the jury whether the prosecutor was the person really aimed at. For this purpose the judgment and opinion of witnesses who, from their knowledge of the parties and the circumstances, are able to form an opinion as to the defendant's intention, and the application of the libel is evidence for the information of the jury." And see vol. 1, p. 54. In the most recent edition (15th) of the same standard work by Folkard, p. 464, we find : The application of the language to the plaintiff is usually proved " by the testimony of one or more witnesses who know the parties and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant, as alleged in the statement of claim. * * It is sufficient if, in the first instance, he state his belief and opinion as to the defendant's meaning generally, without disclosing his reasons," etc. Again, at p. 113, it is said that the application of the injurious charge to the plaintiff may be collected generally from a

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OSLER, J.A.

variety of circumstances, as from his having been the subject of previous communications, or by any other means which are sufficient to induce the hearers to apply the offensive imputations to him. See also Odgers' Law of Libel, 2nd ed., p. 567. For instances of the practical application of the rule thus stated it may be enough to refer to *Wakley* v. *Healey*, 7 C. B. 591, 600, where the jury found that the term "adventurer" was intended to apply to the plaintiff, and *Le Fanu* v. *Malcomson*, 1 H. L. C. 637, where the libel complained of imputed that in some of the Irish factories certain cruelties were practised. It was held that the application of these words to the plaintiff might be shewn. *Arguendo*, it was said, and no doubt correctly: "The true rule is that whether the parties are named or not, if the libel has an individual application and if the witnesses shew it to have such an application, that is sufficient." See also *Marsden* v. *Henderson*, 22 U. C. R. 585, and *Ex parte Gower*, 43 J. P. 127. Here, I think, there was ample evidence of a quite unexceptionable character, of opinion based on facts and circumstances, to prove the application of the libel to the plaintiffs. The defendant offered no evidence to the contrary and the jury have found that it was intended to apply to them.

There remain the questions whether as regards the damages evidence was erroneously admitted as to the probable effect or tendency of the libel to injure the plaintiffs' business, and if so, whether a new trial should be granted on that ground. Special damage was not alleged or attempted to be proved, and there was no evidence of any actual loss or diminution of business by reason of the libel, although this might properly have been given if the facts would have admitted of it; indeed, in actions like this it is customary to give some evidence of that kind: *Evans* v. *Harries*, 1 H. & N. 251; *Riding* v. *Smith*, 1 Ex. D. 91, although as Gwynne, J., points out in *Dominion Telegraph Co.* v. *Silver*, 10 S. C. R. 238, at p. 276, without any such evidence some moderate damages might be given as recoverable in law by reason of the words being action-

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OSLER, J.A.

able in themselves. Upon such evidence it would be for the jury to say whether the libel was calculated to inflict any injury upon the plaintiffs' business, and I cannot say that I have any doubt that in strictness the witness's opinion as to its tendency in that direction was not admissible. Such a question incidentally asked and answered might pass without its being thought worth while to make a mountain of it, but if it was right to ask it of one witness any reasonable number might be called for the same purpose, and that I think is an unanswerable test of its impropriety. Here it was asked deliberately and there seems to have been a considerable struggle for its admission, and it was only admitted after strong objection and a formal ruling of the learned trial Judge. It was in principle a very different kind of question from those which may be asked to prove the application of the libel or why a particular statement may, under certain circumstances, known to the witness, surrounding a class or an individual, be libellous as to a member of the class or the individual. Ought we then on the ground of the reception of this statement to set the verdict aside? We are not to do so unless we are of opinion that some substantial wrong or miscarriage has been occasioned by the error: Con. Rule 791.

The exercise of this jurisdiction is a matter of considerable delicacy, particularly in an action of libel where the assessment of damages is so peculiarly within the province of the jury, having regard to all the circumstances of the case.

In *Dominion Telegraph Co.* v. *Silver*, 10 S. C. R., 238, where the plaintiff, contrary to objection, gave evidence of special damage where he had no right to do so and an unconscionable verdict of $7,000 damages was given for a mere slip, the Court set it aside.

In another case of *Higgins* v. *Walkem*, 17 S. C. R. 225, where the trial Judge had misdirected the jury by not withdrawing from their consideration certain of the innuendoes alleged, of which the Court held the libel was

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not susceptible, and the jury had given a verdict of $2,500, the Supreme Court held that though the case had been improperly left to the jury, the only prejudice sustained by the defendant was that of excessive damages, and they allowed the verdict to stand on the plaintiff consenting to reduce the verdict to $500. But in the most recent case on the subject, *Ford* v. *Bray*, [1896] A. C. 44, where a large verdict had been recovered, the House of Lords, reversing the Court of Appeal, set it aside and refused to act upon the rule because the judge at the trial had misdirected the jury in such a way as to lead them to take an erroneous view of the libel by withdrawing from them an important question which the defendant had the right to have submitted to them, viz., whether the complaint which had given rise to the libel was in point of law well founded. The observations made by the Lord Chancellor and by Lord Herschell on the subject are instructive. The former said: "It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant." Lord Herschell said: "They (the Court of Appeal) thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned Judge had been the other way." Then he says that in his opinion the rule does not sanction that mode of dealing with the case: "In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the Court think that the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection." He goes on to point out the peculiar character of the

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OSLER, J.A.

action of libel as regards the assessment of damages by the jury, and adds: "Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial or miscarriage within the meaning of the rule."

In its application, as the Court say in the last case cited, each case must depend upon its own circumstances. What I might have thought it right to do had the evidence complained of been pressed or made a point of throughout the case I need not say. Here there was but the one question asked and answered on the subject. There was no misdirection and the damages are not large. Had the attention of the jury been directed to it as something on which the case turned, or to which they ought to pay attention, a different view might have to be taken of it, but it occupies a comparatively trivial and unimportant position in the case, being a mere statement of the witness's opinion, on a matter on which the jury were told—in a charge very favourable to the defendant—that they were to form and act upon their own. I find it difficult to say, affirmatively, that this isolated answer was at all likely to occasion a substantial wrong or miscarriage, and, on the whole, therefore, the inclination of my opinion is to uphold the judgment and dismiss the appeal.

MACLENNAN, J.A.:—

I agree.

Appeal dismissed.

TIERNAN v. PEOPLE'S LIFE INSURANCE COMPANY.

Insurance—Life Insurance—Payment of Premium—Agent's Authority.

An agent of an insurance company has no power to bind the company by giving a policy holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy holder to the company, the policy on its face providing that payment of the premium in cash to the company was necessary.

Judgment of ROSE, J., 26 O. R. 596, affirmed.

Statement. THIS was an appeal by the plaintiffs from the judgment of ROSE, J., reported 26 O. R. 596.

The plaintiffs were the executors of the Rev. Joseph P. Molphy, and brought the action to recover the sum of $1,000 under a policy of life insurance issued by the defendants, dated the 20th of April, 1894. By this policy, "in consideration of the application for insurance and of the agreements and statements contained in such application, which are hereby made part of this contract, and of the annual premium of $52.35 to be paid in advance to the company," the defendants agreed to pay to Molphy's executors, administrators, or assigns, the sum of $1,000 upon proof of death. The policy contained a condition that "thirty days' grace shall be allowed for payment of premiums; after the expiration of thirty days from the time any premium is payable, if the same be unpaid, this policy shall be void;" also a condition that "no payment of premium shall be effectual or binding upon the company (notwithstanding that the usual receipt may have been given therefor), if the same be made by cheque or note, and such cheque or note be not paid according to the exigency thereof;" and a provision that "no condition of this contract can be changed, waived, or altered, except in writing, signed by the president or manager of the company." In the application for insurance, dated the 3rd of April, 1894, it was stipulated that the policy to be issued thereon, should not be in force "until the actual payment and acceptance of the first premium due thereon, by an authorized agent of the company, and the delivery to the

insured of the necessary receipt, signed by the general manager."

Statement.

Molphy died on the 21st of November, 1894. The defendants in answer to the claim, pleaded that incorrect statements had been made by him in his application, but their main defence was that the premium had not been paid.

The action was tried at Woodstock, on the 22nd of March, 1895, before ROSE, J.

An agreement dated the 21st of November, 1893, between the defendants and E. J. Lomnitz and R. L. Barwick, was put in. By this agreement the defendants appointed Lomnitz and Barwick general managers of the company with very wide powers. Lomnitz and Barwick agreed to take the benefit and burden of all contracts between the company and its agents, and to indemnify the company from all claims for commission, advances, or expenses by any agent. They were to have exclusive charge and management of all agents, and the exclusive right to appoint and dismiss agents, but were to have no authority to accept or reject applications for insurance; and they were to receive as compensation for their services a commission on the premiums received, the amount of commission on the first premium for any insurance being seventy per cent. of the amount thereof.

It was not contended that the premium for Molphy's insurance had been paid in cash. It appeared, however, that Lomnitz, without the knowledge of Barwick, had in consideration of certain services alleged to have been rendered by Molphy in the way of canvassing, given to Molphy on the 3rd of April, 1893, a receipt for the amount of the premium; and had afterwards handed to Molphy the policy issued by the company. The policy was entered in the books of the company as an existing risk. In September, 1894, however, the cashier of the company wrote upon the register the word "cancelled," and he stated that he did this under the authority of the directors on account of non-payment of the premium. There

Statement. was no entry in the accounts of Lomnitz and Barwick of the receipt of the premium in question, and they were not charged with the premium by the company.

On these facts ROSE, J., held that the plaintiffs failed, and dismissed the action.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 27th and 28th of January, 1896.

McCarthy, Q. C., and *J. B. Jackson*, for the appellants. There is a covenant under seal by the defendants to pay the amount of this insurance, and it is too late now to object that the consideration has not been paid. The conditions in the application cannot be appealed to: 55 Vict. ch. 39, sec. 33, sub-sec. 1 (O.). The agents had full authority to enter into an agreement of this kind with Molphy, and they were quite justified in allowing to him, in consideration for services rendered, the amount of this premium, and their action in so doing is binding upon the company. There is no principle of law requiring payments of premiums in money. On the contrary, payment may be made in any way that the insurers are willing to adopt and therefore these agents were able, if they saw fit, to accept payment in this way: Bacon on Life Insurance, sec. 389. The cases cited in the judgment below do not apply, except perhaps to some extent, *Fraser* v. *Gore District Mutual Fire Insurance Co.*, 2 O. R. 416, which is, however, distinguishable, as here the agents were not merely agents to collect, but also to make contracts. At most this was a mere case of failure on the part of the agents to account for a premium that should have been collected by them, and the company's only recourse is to look to them for payment, leaving the liability on the policy intact: *Moffatt* v. *Reliance Mutual Life Assurance Society*, 45 U. C. R. 561; *Sheldon* v. *Connecticut Mutual Life Ins. Co.*, 1 Big. Ins. Cas. 27; *Dean* v. *Etna Life Ins. Co.*, 4 Big. Ins. Cas. 341, *Insurance Co.* v. *Coate*, 20 Wall. 560; *Robin-*

son v. *International Life Assurance Society*, 1 Big. Ins. Cas. 601. Argument.

W. H. Hunter, for the respondents. The policy itself contains no receipt for the premium, and is made in consideration of the application which is declared to be part of the policy. The application expressly requires actual payment and a mere personal obligation on the part of the agents, if any such obligation really existed, could not bind the defendants. The reference in the policy to the application is sufficient: *Venner* v. *Sun Life Ins. Co.*, 17 S. C. R. 394. Sub-section 2 of section 33 of 55 Vict. ch. 39 (O.), must be read with sub-section 1, and sub-section 1 is explained in 58 Vict. ch. 34, sec. 5, sub-sec. 10 (O.), the application being specifically made part of the contract. Besides, the section applies to a contract actually made, and here the question is whether there is a contract or not, and all the documents must be looked at to decide whether any contract has been entered into. The agents had no power to accept applications for insurance, and a mere setting-off of accounts between the applicant and the agents was not equivalent to a payment of the premium: *Walker* v. *Provincial Ins. Co.*, 8 Gr. 217. Even if the agents could under any circumstances enter into a transaction of this kind, they could do so only as their joint act. The evidence is clear that the present arrangement was made by Lomnitz alone, and that in itself is an answer to the claim.

McCarthy, Q.C., in reply.

March 10th, 1896. HAGARTY, C. J. O.:—

The defence on which the case turned, was that there never was any payment in any way or shape for the premium for the first year and no note or security therefor. The insured died on the 21st of November, 1894, seven months after the issue of the policy.

Lomnitz gives a rather peculiar account of this matter. He said Molphy had voluntarily assisted him in obtaining business for the company.

Judgment.

HAGARTY, C.J.O.

They got one direct case, and indirectly he thinks he assisted. At the time he took his application he arranged with him and told him that for the assistance he had given them, he would give him his first year's premium. He gave him a receipt dated 3rd of April, 1894, for $52.35, conditioned that if his application be accepted by the company, the same should be applied for first annual premium; if rejected, the managers agree to return the money, signed, Lomnitz and Barwick, general managers.

He says this was his personal receipt, not a receipt issued on behalf of the company passing through their books.

Lomnitz prepared Molphy's application. There is no evidence that he ever made or advanced any claim whatever for services or otherwise against the company. Seventy per cent. of the premium would go to Lomnitz—only $15 thereof to the company. But nothing whatever was paid by Molphy.

It seems a wholly gratuitous proceeding on the manager's part. He says he did not place any specific value on his services.

Lomnitz left the company's service in the following September, before the life dropped.

Neither in any account for the April business or any succeeding month, till he left, was any entry or return made as to this premium, or any statement of any settlement with Molphy. He says that from the time the policy left the accountant's possession and was given to him, the company did not know what had become of it; and they had a right to suppose the premium was not settled for. Nor was there any entry in Lomnitz and Barwick's books of the premium.

Barwick (his partner) said he knew nothing of any arrangement with Molphy till about September, when he heard it from Lomnitz; that there was no entry in their books.

Hand, cashier of the company, proved that no premium was ever received. The policy was made out, and appears to have been sent in a letter signed by Lomnitz to Molphy,

Judgment.

HAGARTY, C.J.O.

dated 20th of April, 1894. He says the managers had the right to issue a conditional receipt like that in question. He proved about the monthly reports, and that there was no return as to this insurance, nor in Lomnitz and Barwick's books; no entry any where as to the premium being charged to the agents. By order of directors, he marked policy as cancelled when Lomnitz left in September.

The company's receipt given when a premium is paid, is sent with the policy to the agent to give when paid. No receipt except the conditional one is produced on the plaintiffs' part.

I am of opinion that my learned brother Rose was right in dismissing this action, for the reasons stated in his judgment.

I cannot think that any agent would have the power of making his company liable on his choosing to give a receipt expressing the full payment in money of the premium required for the first year, because he thought proper to value some wholly voluntary assistance that the insured had rendered, for which no demand was made or recompense asked or stated. On this arrangement he has the policy executed and sent to the enclosed, and for months until he leaves the company no return of the premium or the arrangement was made to his company. They had a right to consider the policy abandoned.

The fault was chiefly that of Lomnitz; but the deceased must have known that the receipt for $52 in cash did not truly represent his dealing with the agent, and when he received the policy, he saw the express provision that that sum must be paid in advance to the company at its head office, Toronto, and that no condition could be waived except in writing, signed by the president or manager. He had also signed an application that "under no circumstances should the policy be held to be in force until the actual payment and acceptance of the first premium;" and at the head of the application, that no policy would be issued unless the cash for the first premium be sent.

Judgment.

BURTON, J.A.

BURTON, J. A.:—

This is a case, I think, I may say, "*sui generis*," the company having delegated nearly all their powers, if not all their powers, to two persons, who are designated general managers. It is true that in the instrument appointing them this clause is to be found:—

"The said parties of the second part have no authority to accept or reject on behalf of the said company any application of insurance, but applications for insurance shall be submitted to the company or the officers of the company designated for that purpose," but the evidence shews that the policies did not come before the directors, but that the general managers acted on the applications after approval by the medical officer; in other words, as I understand it, the managers issued the policies which already had the signature of the president and seal of the company attached.

This course of dealing would override the clause in the instrument appointing them, and would, I think, render the policy in this case binding on the company if it had been issued as the joint act of the managers.

Under so complete a delegation of their powers, I should lean to the opinion that the allowance to the assured, if it had been the joint act of the managers, would have been a waiver of the payment of the premium in cash. The company had an undoubted right to accept services, or the promise of services or influence, in satisfaction of the premium, if they had thought proper to do so, and I incline to think that a similar course of dealing by their agents would have, under the circumstances, been binding upon the company.

But it is unnecessary to consider how that would have been, for neither the original agreement nor the issue or delivery of the policy was known apparently to Barwick, and although *primâ facie* the policy would be binding on the company, I think it was competent to them to shew that the policy was never completed by the payment of

the premium, but was delivered without authority by one of the agents only, without payment of the premium, which he alone had no power to waive.

Judgment.

BURTON, J.A.

Upon this short ground, I think the defendants escape liability.

OSLER, J. A.:—

The policy is on its face expressly stated to be in consideration of an application for insurance by the deceased, and of the agreements and statements contained therein, "which are hereby made part of this contract and of the annual premium of $52.35, to be paid in advance to the company at its head office, on or before the delivery of this policy." The application thus incorporated with the policy is signed by the deceased. He thereby expressly agrees with the defendants that it shall be the basis of the contract between the company and himself, "and that under no circumstances shall the policy be held to be in force until the actual payment and acceptance of the first premium due thereon, by an authorized agent of the company, and the delivery to the insured of the necessary receipt, signed by the general manager."

This premium was never, nor was any part of it, in fact paid either to the company or to their general managers, Lonnitz and Barwick. These gentlemen were the joint general managers of the company at Toronto, appointed under a special agreement in which their powers are defined. Toronto was then the head office of the company, and the staff appears to have consisted of the general managers and the cashier of the company, one Hand, who acted also as clerk for the general managers. The course of business was that on the risk proposed by the application being approved by the company's medical officer, the general managers issued the policy without further communication with the company. I infer that forms of policies sealed and signed by the president of the company were entrusted to the general managers, by one

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OSLER, J.A.

of whom on behalf of both they were countersigned before being issued. In this instance Lomnitz sent the policy to the applicant, but the official receipt for the first premium was not sent with it nor at any time. The plaintiffs contend that the company is estopped from denying that the premium was paid.

It appears that when Lomnitz took the application, he told the applicant that as compensation for certain assistance he had volunteered in obtaining business for them they would give him his first year's premium. He had put forward no claim for it, and there was no legal liability on their part to pay him, but this was the way in which one of the joint managers agreed that the first premium should be paid if the risk was accepted. At the same time Lomnitz gave him a receipt, not the company's official receipt for the first premium, as on an accepted risk, but the personal receipt of the general manager, which stated that $52.35 had been received from him on the following express conditions: (1) that if the application was accepted by the company and its policy issued, the said sum should be applied in payment of the first annual premiums; (2) that if not approved and accepted, it should be returned on the surrender of the receipt. There was no entry in the company's books by the managers charging themselves with the premium, nor any return or statement made by them shewing its receipt.

The agreement between the company and the general managers gives them no authority to dispense with payment of the premium, or to receive payment of it in any other way than by cash or note. The right to "settle for" a premium by taking a note therefor, is expressly recognized, but in other respects, and apart from the general rule of law that an agent has no authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of any usage to the contrary: *Sweeting* v. *Pearce*, 7 C. B. N. S. 449, at p. 485; *Bridges* v. *Garrett*, L. R. 5 C. P. 451; *Pape* v. *Westacott*, [1894] 1 Q. B. 272 the language of the agreement strongly imports that limi-

Judgment.

OSLER, J.A.

tation upon the agent's authority. The clause requiring "uncollected policies" to be returned, is very suggestive.

The delivery of the policy to the applicant is at most *primâ facie* evidence of the payment of the premium, as the instrument contains no admission or acknowledgment of payment. I do not think it could be argued that the policy had been delivered as an escrow as in *Confederation Life Association* v. *O'Donnell*, 10 S. C. R. 92; 13 S. C. R. 218, and 16 S. C. R. 717. Lomnitz no doubt intended to deliver it as a completed instrument.

The case, therefore, must turn upon the question whether what took place between him and Molphy the applicant, can be regarded as a payment of the premium. I should say it was clear that he, or I might say the general managers, had no authority to issue a policy without payment of any premium; and I think we should hold, agreeing with Mr. Justice Rose, that they had no authority to agree to treat it as paid by giving the applicant credit for it as upon some personal claim against themselves.

The terms of the application and the policy shew that the applicant was dealing with the company through their general managers on the footing that they were agents only for effecting insurances on payment of a premium, and if such payment was to be made in any other way than in cash, it was clearly the duty of the applicant to ascertain the scope of their authority, failing which he dealt with them at his own risk: *Montreal Assurance Co.* v. *McGillivray*, 13 Moo. P. C. 87.

I am further of opinion that the company have the right to say that what was done was the sole action of Lomnitz, and that the general manager Barwick was no party to the agreement with Molphy, or to the issue of the policy to him: *Summers* v. *Commercial Union Assurance Co.*, 6 S. C. R. 19.

I refer to *Western Assurance Co.* v. *Provincial Ins. Co.*, 5 A. R. 190, as to the authority of agents to give credit for premiums by setting-off accounts.

I rest my judgment upon the manager's want of author-

Judgment.

OSLER, J.A.

ity to make the agreement he did make with Molphy, and to deliver the policy so as to be a contract binding upon the company without payment of the premium.

I do not think it necessary to resort to the application and the agreement therein set forth, or to consider whether it has been "set out in full on the face or back of the policy," within the meaning of 55 Vict. ch. 39, sec. 33 (1), in such a way as to entitle the defendants to rely upon it: see *Venner* v. *Sun Life Ins. Co.*, 17 S. C. R. 394, and compare *Village of London West* v. *London Guarantee Co.*, 26 O. R. 520.

MACLENNAN, J. A.:—

I regret to have to decide that this appeal fails, but the plaintiffs cannot be allowed to recover otherwise than according to the contract between the assured and the company. The policy in question is dated on the 20th of April, 1894, at which time sec. 33 of 55 Vict. ch. 39 (O), the Insurance Act of 1892, was in force. The amendment of that section by 58 Vict. ch. 34, sec. 5 (10), had not then been passed, and the effect of sec. 33 of ch. 39, seems to be to exclude from the contract anything contained in the application for the insurance which was not set out in full on the face or back of the policy, notwithstanding that the application is referred to and the statements and agreements contained therein made part of the contract. The policy, therefore, is the contract between the parties, and their rights and liabilities must be governed thereby. Then the policy is expressed to be in consideration of an annual premium of $52.35, to be paid in advance to the company on or before delivery of the policy.

It then goes on to provide that "thirty days' grace shall be allowed for payment of premiums; after the expiration of thirty days from the time any premium is payable, if the same be unpaid, this policy shall be void except as provided in the following clause." The following clause has no effect in the present case in qualifying that stipula-

Judgment.

MACLENNAN, J.A.

tion. Then what is the effect of the stipulation? The first premium was to be paid in advance on or before the delivery of the policy, and thirty days' grace was allowable. Therefore, when this policy was issued and delivered to the assured, he became insured for thirty days, although he had made no payment of premium at all; but when the thirty days had elapsed, the policy became void. But then the plaintiffs rely upon the receipt of the 3rd of April, signed by the general managers, acknowledging the receipt of $52.35, to be applied in payment of the first annual premium. The truth was, however, that no money had been paid or received; and if there was nothing else in the case, this receipt would have no more effect than in other cases where it is shewn that the money expressed to have been received was not received in fact; that is to say, no effect whatever. But it is said that the deceased had rendered services to the company, or to the agents, in the way of procuring business, and that those services were intended to be paid for by the money expressed in the receipt to have been received. I do not think that the loose evidence of agency, or of compensation therefor agreed to be paid, can at all avail to constitute payment of the premium as against the company. It would, in my opinion, require a great deal more to be shewn than was proved here, to be sufficient evidence of payment to bind the company. The remuneration of sub-agents was entirely a matter between them and the general agents; and I think the company could not be held bound by a set-off such as contended for here, unless and until the company had actually received from the agents, either in cash or by mutual accounting, a sum equivalent to the premium. But even if the application ought to be regarded, by reason of the words incorporating it therein, as part of the policy and of the contract between the parties, the result is equally fatal to the appeal. The application contains an agreement that under no circumstances should the policy be held to be in force until the actual payment and acceptance of the first premuim due thereon by an authorized

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MACLENNAN, J.A.

agent of the company, and the delivery to the insured of the necessary receipt signed by the general manager. Now that is an agreement which cannot be held to have been merged in the policy, because by its very terms it contemplates that the policy has issued, and provides for a state of things subsequent to its issue. It is in effect a condition by which the effective operation of the policy is declared to be suspended until it shall have been performed. The delivery of a receipt alone will not do. There must also have been actual payment. Here there was no payment whatever, and until payment the policy was no more than an escrow, for reading the application and the policy together, the thirty days' grace would only apply to premiums after the first: *Sun Life Assurance Co.* v. *Page*, 15 A. R. 704; *Confederation Life Association* v. *O'Donnell*, 13 S. C. R. 218.

I, therefore, think that the appeal must be dimisssed.

Appeal dismissed.

The Commissioners for the Queen Victoria Niagara Falls Park v. Howard.

Crown Lands—Ordnance Lands—Chain Reserve along Niagara River.

The "chain reserve" along the bank of the Niagara river, and the slope between the top of the bank and the water's edge, were not originally set apart for military or ordnance purposes, and on Confederation did not pass to the Dominion Government as "Ordnance Lands," but remained part of the public domain of the Province of Ontario.
Judgment of Boyd, C., 23 O. R. 1, affirmed.

Statement.

This was an appeal by the defendants from the judgment of Boyd, C., reported 23 O. R. 1, and was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ.A., on the 30th of October, 1895, and six following juridical days.

The action was brought to try the title to a part of the reserve along the bank of the Niagara river, and of the slope between the top of the bank and the water's edge; the question being whether the land in question belonged to the Dominion Government as ordnance lands, or to the Provincial Government as public lands of the Crown.

Robinson, Q. C., and *W. P. Torrance*, for the appellants.
Irving, Q. C., and *Moss*, Q. C., for the respondents.

March 10th, 1896. Hagarty, C. J. O. :—

The learned Chancellor in his extremely interesting, instructive and elaborate sketch of the history of the land in question from 1786 down to 1843, has come to the conclusion that the chain had never become the subject of ordnance control or management as a military property but was always a highway—part of the ungranted lands of the Crown, and as such part of such lands belonging first to Upper Canada, then to the Province of Canada, and on Confederation in 1866, part of the public domain of Ontario. I understand him as considering that it cannot be said to have changed its character so as to pass under the Vesting Act.

Judgment.

HAGARTY, C.J.O.

It is possible that in the result at which I finally arrive in this contention between the two governments, I may substantially agree with the Chancellor, though I hardly accept his view of the long dealing with the land down to 1843.

I think with him that the creation, as it were, of this chain or road, was not necessarily to be considered as shewing a merely military work, but as a laying out of a road, through an unsurveyed tract of country, for the transit of military stores of the King and the ordinary commerce of the country between the landing place at Queenston and the navigable waters at Chippewa.

It did not always follow the river bank, but passed inland when necessary. But it appears to me that after being so laid out, it was almost always looked upon and treated as in the charge of the ordnance officers and the military commandant.

I quite agree that in the voluminous correspondence and official documents from 1787 to 1843, the chain is spoken of indiscriminately as a military reserve, ordnance reserve, reserve, public road, chain reserve, etc.

But while I think it was a road for the public as laid out by the King's surveyor, coming within the Highway Act of 1810, I also think it was during the half century up to 1843, practically in charge and direction of the ordnance officers under the orders of the commandant.

I agree with the learned Chancellor, that whoever may own the chain along the bank, the slope cannot be included and belongs to Ontario.

If this had been a purely military road along the bank of a river, dividing us from a foreign country, it would have been naturally considered that the almost precipitous slope to the water's edge, would be included in the ownership of the road on the surface. But we find in the original survey of Augustus Jones, that in Stamford, some short distance above the part in dispute, his road turned inland and passed on what is called the upper bank, a considerable way above the flat-land between that bank

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HAGARTY, C.J.O.

and the river, on which flat-land grants have been made by the Crown to individuals, and where the museum, the Zimmerman (afterwards the Bush) property and residence stand, and although the Ordnance authorities claimed that upper bank as their boundary, I think such claim was untenable.

It was found in the proceedings in the Forsyth case, that the land granted to Forsyth and others, ran to the boundary road laid out by Jones, and not down to the lower or precipitous bank. Where the contest is in this case, is below that upper bank divergence, but it tends strongly in my mind to shew that the slope was never included in the chain on the surface

If the slope did not belong to or form part of the chain reserve, it would remain the property of Ontario. Such a result would be fatal to the defendant's right, which is to form a road or tramway down the bank at the water's edge, and at each end a small piece of the chain reserve is granted for their elevators to run to the surface ground.

Whether this chain did or did not stand embraced in the wide net of the Act of 1843, I think the title must be determined by the subsequent legislation of the Province of Canada.

If the chain had been at the time of the passing of that Act, and for long years, under the control or management of the Ordnance officials or department, although also used and treated as a public highway, it would not be difficult to hold it to be partly within the far reaching language used.

The Ordnance Vesting Act of 1843, 7 Vict. ch. 11, does not contain any such description of the lands as would prevent it including the lands in question.

The schedule attached only refers to the military reserves and all lands within the description of those intended to be vested in the public officials by the Act, situate and being at or near the cities, towns and places commonly known by these names (*inter alia*) Niagara, Queenston, Drummondville, Stamford, Chippewa, Lyon's Creek, Fort Erie, etc. The cumbrous and unwieldy verbiage employed in this Act is rather bewildering.

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HAGARTY, C.J.O.

The draughtsman has certainly designed his net to include almost every conceivable property to which the ordnance or military stamp or impress could be applied—lands that have been set apart or placed under the charge or control of officers of the Ordnance for purposes connected with defence, or have been used and occupied for like purposes; and lands which have been purchased for like purposes and conveyed, etc., in trust to Her Majesty, etc., it is expedient to vest in the provincial officers in trust for Her Majesty. Be it enacted that all castles, forts, lines, etc., lands covered with water, beaches, beds of rivers, canals, etc., within this Province, vested in Her Majesty, or in any person or officers in trust for her, and set apart, used, or occupied for purposes connected with military defences, or placed under the charge and control of the officers of Ordnance or of the Commander of Her Majesty's Forces, etc., or have been intended to be so set apart or transferred for any of the purposes aforesaid, etc., but without intending that the enumeration thereof should exclude any other lands, etc., within the descriptions aforesaid, and the lands and other real property described in the schedule to this Act annexed, etc., the Rideau canal, etc., are hereby vested in the provincial officers in trust for Her Majesty.

The Act of May, 1855, 18 Vict. ch. 91, was a short Act, declaring Her Majesty's readiness to transfer all Ordnance lands to the Province of Canada, and it divides all the lands, etc., into three classes; class A. to include the lands, etc., at Kingston, Montreal, and Quebec. Class B. those to be retained for the defence of the Province; and a third class C., to be sold or leased, etc., as the Governor-General deems meet; the manner of division among the three classes to be as may be agreed upon by the provincial officers and the Governor-General in Council.

The Act of June, 1856, 19 Vict. ch. 45, of the late Province of Canada, recited that all the Ordnance lands in the Province at the passing of this Act, consisted of the several lands, etc., comprised in the two schedules to the

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HAGARTY, C.J.O.

Act; that all in the first schedule should be transferred from the principal officers and vested in one of Her Majesty's Secretaries of State; and that all such of the lands comprised in the Act of 1843, as are comprised in the second schedule to this Act, should be transferred from the said principal officers and become reinvested in the Crown for the public uses of the Province.

Section 1 directs that the lands in the first schedule and all other lands, except the lands in the second schedule, which by virtue of the said Act, or other Act, or of any conveyance, etc., or any law or usage, have been at any time before passing of the said Act, vested in the principal officers on behalf of Her Majesty; or purchased, vested, or taken in trust for Her Majesty, for use of the department or military defences, and not sold or disposed of, shall be vested in Her Majesty's Secretary of State.

Section 6.—All the lands, etc., mentioned in the second schedule, which by the Act of 1843, were vested in the principal officers and used or occupied for the service of the Ordnance Department, shall be and become vested in Her Majesty for the benefit, use, and purposes of the Province, and subject to the provisions of 16 Vict. ch. 189, for the sale, etc., of public lands.

Section 8 then refers to the Act of the preceding session relating to Ordnance lands dividing them into three classes; that all lands in the first schedule of this Act, shall be deemed to be in class A., and class B. of said Act shall be deemed to consist of lands, etc., in the second schedule in this Act; and of such lands, etc., as may from time to time be placed in class B. by the Governor-General, and the remainder of lands in the second schedule of this Act, shall form class C. under that Act, and the classes B. and C. as provided in said Act.

Section 9 declares that with respect to all lands, etc., in the second schedule, they be vested in the Queen for the benefit and purposes of the Province, and the Act of 1843 be repealed.

The first schedule with Quebec, Montreal, Kingston,

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HAGARTY, C.J.O.

lands, etc., mentions "Fort Mississagua and glacis and appuits at Niagara," but does not mention Queenston.

The second schedule contains "Niagara, reserve, barrack and hospital, all except Fort Mississagua;" "Queenston, reserve, all except that sold to the purchasers of the Hamilton estate."

We have no evidence of any special arrangement between the Government and the principal officers as to the division of property into classes as in schedule B., or as to taking from any of the properties therein for military purposes.

An Act 22 Vict. ch. 36 (date of passing not given), with one schedule attached, being the same as schedule 1 of ch. 45 of 19 Vict. seems to refer altogether to giving various powers to the Imperial Secretary of State, to whom all lands in the schedule are transferred, excepting the lands in the second schedule.

The last section contains the same provision as in the Act of 19 Vict. as to the lands in the second schedule transferred to the Province.

This is the last Act said to bear on the question up to Confederation in 1867.

We find about November, 1858, the Executive Council discussing the memorandum of the Ordnance Lands' agent offering suggestions as to their future disposal, and as to the recommendation of the Commissioner of Crown Lands for sale of several Ordnance properties, amongst which are about 100 acres at Queenston on the bank of the Niagara, with stone quarries and fisheries, etc., and the correspondence with the agent as to the best means of disposing thereof.

Before and after the Act of 1843, we find the Ordnance officers constantly exercising acts of control and management, so far as practicable, over this reserve, and there seems to have been little, if any, interference on the part of the Government.

But at all events about 1855, when the change was made in the transfer to Her Majesty's Secretary of State,

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a strong desire appears apparent to get rid of all of the so-called Ordnance property, except certain specially preserved portions, and to transfer the rest to the general use of the Province.

The Imperial Government seems to have been for a long time anxious for such a transfer; and in 1854, Sir George Grey, Colonial Secretary, had addressed the Governor-General on the subject.

In 1851-2, we find much correspondence between the Provincial Government and the Ordnance Department, and the latter offered to transfer a large portion to the Province. Accordingly in 1852, the surrender was effected, and the greater part of the chain along the river was transferred to the Crown—certain specified portions being retained by the officers.

After the passing of the Acts already noticed, in 1856, the Government appointed Colonel Coffin an agent to have the management of the lands transferred, and for the sale and disposal thereof under the direction of the Government. Various reports, etc., by this officer were made to the Government, shewing active exercise of authority as to fishing rights, etc., along this chain and the slope to the river, and discussions with the Government as to the sale and disposal thereof.

The Confederation Act of 1866, in its schedule of public works and property, declares as belonging to the Dominion of Canada, sub-section 9, "property transferred by the Imperial Government, and known as Ordnance property."

I cannot consider this provision as applicable to the subject of this contention. When this Act was passed, the lands known as Ordnance lands had, by the action of the Imperial government through its officers, been divided as it were, into two named classes, one being retained for military purposes, the other, released from Ordnance control and merged in the public lands of Canada, and as such becoming the public lands of Ontario.

For some years before Confederation, there seems to have been much difference of opinion as to whether this

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chain was Ordnance or public property, and after Confederation, a most curious difference of opinion seemed to exist between the Dominion and Provincial authorities as to the ownership of this land, each at times disclaiming and asserting jurisdiction.

I find that in 1871, Sir John A. Macdonald, then Minister of Justice, than whom few public men were better versed in the relations between the Dominion and the Province, and in the course of legislation preceding Confederation, gives his official opinion that this chain reserve along the top of the river bank formed part of the Crown lands of the late Province of Canada, and passed under the British North America Act as lands belonging to the Province of Canada at the Union to the Province of Ontario.

Such is the opinion I have formed on the law and facts of the case before us.

My judgment is rested chiefly on the statute law of the late Province of Canada up to Confederation.

I cannot pretend to reconcile the conflict of opinion that prevailed for years over this question. Numerous acts may be pointed out inconsistent with what we may now find to be the actual rights of the contestants as governed by the statute law.

Even if our decision were in favour of the defendants as to the jurisdiction or right of property claimed by the Dominion, the grant to the defendants (as already noticed) would be practically worthless, unless we held also that the slope down to the water's edge went with the chain reservation.

This, I think, must be decided against the defendants as pointed out by the Chancellor, and in the prior part of these reasons.

BURTON, J. A. :—

Lord Denman once made the remark (I do not remember on what occasion), that there is a certain description of law which may be not inaptly described as law taken

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for granted, and which turns out upon investigation not to be law at all; in the present case a very generally received opinion as to the reserve now in question being a military reserve has the very slightest substratum of fact in its support, although that opinion was very general, not only before but since the Act of 1843.

I think it will be found that this question must turn upon the effect of the Acts of 1843 and 1856, and the British North America Act, but it becomes necessary in construing the Act of 1843 to consider the position of matters at the time of the passing of that Act; and in view of the very general opinion to which I have referred, I should not consider myself justified in making the above remark without stating, at some little length, my reasons for that opinion.

The original instructions for the survey of the township of Stamford are not forthcoming, neither are the field notes; but it is clear that the survey was continued only to a line one chain or sixty-six feet from the edge of the bank or from the river, when there was no bank. There is no evidence to shew that at the time of the survey this chain reserve was left for any particular purpose; but within a few years, the attention of the land board having been called to the fact that the farmers had very generally enclosed the chain within their fences, they issued an order requiring them, after their crops were off, to open the road to the full width of one chain—an order which, if temporarily complied with, was not continuously acted upon, as to this day no road exists, or ever had existence, except for some short distances.

The road actually in use, not only by the public, but by the military whenever they had occasion to use it, was what was known as the "Portage road" from Queenston to Chippewa, and from there the mode of communication was by water to Fort Erie. No doubt this reserve was treated by military men when speaking of it as a military reserve, but it was never so used in whole or in part.

I think there can scarcely be a doubt that it would have

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been competent to the Crown after the survey of the township of Stamford was completed, to have granted the whole of this reserve to purchasers, which they could not have done if it had become a public highway, as so laid out by authority of the Crown.

One of the pieces of evidence relied upon was the declaration of Lieutenant-Governor Simcoe as Commander-in-Chief of the forces, and the licenses granted to McGill and Canby, and Swayze; but when the actual facts come to be considered, these acts have but little bearing on the question we are considering, and if I am not mistaken, Mr. Robinson almost conceded as much when addressing us in reply.

It must be remembered that in the early history of the Province, when the Crown made grants of land, they not only reserved all gold and silver mines and white pine, but also conveniences for mills; but in 1793, the Lieutenant-Governor in Council rescinded that regulation in an order in council, in these words:—

"For the conduct of the land office department, whereby the several boards are restricted from granting such spots as contain conveniences for mills which are to be reserved in the hands of the Crown, and upon a due consideration of the increase of population and wealth within the Province, it appearing to His Excellency and the council that the reasons assigned for laying such a restraint no longer subsist, it would therefore not be conformable to His Majesty's gracious intentions of promoting the welfare and prosperity of his subjects in this Province should these restrictions continue to be imposed:

"Resolved, That all proprietors of land having thereon conveniences for the erection of mills, are hereby permitted and authorized to make use of such advantages, provided they do not thereby prejudice the navigation, or obstruct the passage of fish in those waters where they usually resort;

"Provided always that the permission does not extend to any part of the river, above or below the Falls of

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Niagara, forming the military communication between Lake Erie and Lake Ontario, which is reserved for the purposes of the Crown."

The restriction applied to the proprietors of lands to whom grants had been made, and whatever the proviso may mean, it appears inconsistent with the view of the land board to which I have above alluded, and treats the reserve not as a highway, but as a reservation generally *for the purposes of the Crown.*

And that this must have been the view of the Government for many years is, I think, apparent, when we find them granting in 1816 in fee simple the chain from Chippewa for a distance of two miles, to a point below the site of Burch's mill, and in the following year refusing to cancel that grant on the suggestion that it had been improvidently made.

It is also obvious that at that time it was doubtful in the opinion of the Executive what was the precise character of the reserve from the use of this language:

"It appears that this chain along the river was generally reserved either for military purposes or for public accommodation in landing on the beach," as the adjacent grants are bounded by it; and the report from which I am quoting then proceeds: "It was not obvious that it was granted for either purpose, but the owner of the land in the rear might complain of any change in the destination of the reserve which might affect the value of his tenure."

The litigation with Forsyth affected a portion of land at the corners of lots 159, 145 and 160; and the question arose then as to whether at that point the reserve was on the upper or lower bank, and the Court came to the conclusion that at that point the reserve was on the upper bank, although it is now conceded that Forsyth's contention was correct, and the reserve was along the lower bank. However that may be, it is pretty clear upon the evidence that, even assuming Jones to be correct, at or near lot 145 the reserve left the upper and was continued northerly on

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the lower bank, and it is conceded that the *locus in quo* upon the level ground was upon what is known as the reserve.

Nothing was decided in the litigation I have referred to as to the character of the reserve, although the direction was given to Captain Philpotts, no doubt under the impression that the portion enclosed by Forsyth was a military reserve; but the late Sir John Robinson in his report does not carry the matter any further than by shewing that there was a general impression that the reserve was made partly with a view to the military defence of the Province, and partly for the purpose of preserving a convenient communication, and that he shared that impression; but he does not appear to have made any investigation, and the existence of its being a military reserve was of vital importance as a justification of the military.

I think the proper deduction from the evidence is, that at the time of the original survey, the scheme was to continue the survey to a line one chain from the river or to one chain from the top of the bank where a bank existed, nothing being then said about the purpose for which the chain was reserved, and that the chain was in fact part of the waste or ungranted lands of the Crown; an assumption borne out by the subsequent dealing by the Government by making a grant in fee simple to Clark and Street, of a large portion of it extending from Chippewa to Burch's land.

It is true that the military authorities were under the impression that the reserve was intended for military purposes, although their notion as to the extent of their rights appears to have been of a very hazy nature.

Captain Philpotts in his evidence, does not say it was a military reserve, but that he understood it was a military reserve—supposed it was reserved for a road not a fortification.

That it was not originally reserved for military purposes is, I think, apparent from the enquiry made by the Surveyor General in 1796, of Lieutenant Pilkington, then

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in command of the Royal Engineers, "whether the Commander-in-Chief, the Board of Ordnance, or others, had made any military reservation on the banks between the landing and Chippewa," to which he replied:

"I have never possessed any directions relative to a reservation on the banks of the river between the landing and Chippewa. I recollect the land board being furnished with a suggestion of Colonel Mann's for that purpose, with a view of preserving a picturesque feature of the country, but I do not concur with the idea of precluding the occupation of any position wherein a work of utility might be established."

This was when Canby and McGill were applying for a part of the reserve for their mill.

This is borne out in the evidence of Augustus Jones, who in one place states that it was recommended by the commandant at Niagara, and by the land board, that one chain should be reserved for public purposes along the front of the township of Stamford.

It is true that in his evidence at the trial of *Rex* v. *Forsyth*, he is reported as saying that he posted off a road for a military reserve, but he does not say that he was instructed to do so, and he probably shared the general opinion that it was so intended without any sufficient grounds for that opinion.

It is clear also that this opinion was shared by some of the heads of the Department of Crown Lands, but such mistakes, if mistakes they were, cannot bind the Government and make the reserve of the chain a military reserve if it was not so made under proper instructions in the original survey.

That the claim that it was reserved as a military reserve did not arise until many years after the survey, is apparent. On a petition for a grant of a portion of it in the township of Bertie in 1836, the Government in refusing, put their refusal on the ground that it was originally made for public purposes; and I agree with the learned Chan-

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cellor that there is nothing reasonably to lead one to the conclusion that it was restricted to military purposes.

As an instance of the very vague and unreasonable view taken by the Ordnance Department as to the right of the military, we need only refer to the letter of the officers of the Board of Ordnance of the 6th February, 1852, enclosing a plan under which they proposed to retain the portion of lot 144, lying between what they assumed to be the one chain reserve on the upper bank, and claiming the whole of the lot lying between it and the water of the river, although the whole of this lot had been granted by the Crown on the 31st December, 1798, and the deed of surrender actually executed purported to convey the portion of the reserve which years before had been granted to Clark and Street.

We also find Clark and Street, when interfered with in their quarrying of stone by the military authorities in 1835, remonstrating in this way: "We have resided in Upper Canada ever since it was a Province, and have always understood that the reserved chain of land along the Detroit, Niagara and St. Lawrence rivers, was for the use of the public, and no more under the superintendence of the military, than other ungranted lands of the Crown."

These are the kind of acts exercised by the Board of Ordnance; it is not pretended that they were ever in exclusive possession or occupation of the chain or any part of it; or that it was ever used by them as a military road, and we have to consider whether it falls within the Act of 1843, 7 Vict. ch. 11, vesting in the principal officers of the Ordnance, the property in the Act described.

That Act sets out with a recital that whereas divers messuages, lands, tenements, estates and other hereditaments, and real property, lying within this Province, have been at various times set apart from the Crown Reserves or other Crown Lands and property in this Province, or from the Clergy Reserves therein, and have been placed under the charge and control of the officers of Her Majesty's Ordnance, or of the Commander of the Forces, for purposes connected

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with the defence of the Province, and the service of the said department, or have been used and occupied for like purposes; and whereas other messuages, lands, tenements, estates and other hereditaments and real property have been at divers times purchased for like purposes, and conveyed or surrendered to, or in trust for Her Majesty, or her royal predecessors, or have been taken for like purposes under the authority of some Act or Acts of the Legislature of the late Province of Lower Canada, or of the late Province of Upper Canada, and are by the provisions of such Acts vested in Her Majesty; and the price or compensation of and for the same, hath been paid out of the funds provided for that purpose by the Parliament of the United Kingdom; and, after declaring that such parts of the property as might not be wanted for the service of the department (*sic*), or for the military defence of the Province, should from time to time be sold and disposed of and that for that purpose, and for the better protection and management of the same, it was expedient and necessary that the same and all other property of the nature and description thereinafter mentioned, should be vested in the principal officers of Her Majesty's Ordnance, proceeded to enact that, all real property, rights, easements and servitudes whatsoever (all which things shall be intended by the words, "lands and other real property" wheresoever they occur in this Act) within this Province, and immediately before that time vested in Her Majesty, or in any person or persons, officer or officers, in trust for Her Majesty, and set apart, used or occupied for purposes connected with the military defence of the province, or placed under the charge and control of the officers of the said Ordnance Department, or of the Commander of Her Majesty's Forces, or other military officer or officers, whether the same have become so vested in Her Majesty, or her royal predecessors, for such purposes by the cession of this Province, or have been by her or them set apart or transferred from the lands, demesnes, or other real property of the Crown, or from the Clergy Reserves, or have been intended to be so

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set apart or transferred, for any of the purposes aforesaid, or have been purchased for such purposes by any person, or officer, and paid for out of funds provided for that purpose by the Parliament of the United Kingdom, and surrendered or conveyed to Her Majesty, or have been set apart or transferred, or have been taken for any such purposes under the authority of any Act or law in force in this Province, and more especially, but without intending that the enumeration or specification thereof should exclude any other lands or real property within the description aforesaid, the lands mentioned and described in the schedule to the Act annexed, shall be vested in the principal officers of Her Majesty's Ordnance.

Considering the very hazy nature of the claim of the Ordnance to treat this reserve as a military reserve, its omission from the schedule is not without significance, whilst I fully concede that if it falls within the description of property referred to either in the recital or enacting part of the Act, it would pass under it to the principal officers.

There is nothing which can be called evidence to shew that it was set apart and placed under the charge or control of the officers of the Ordnance; or that it was used and occupied by them for purposes connected with the military defence of the Province, but the granting portion goes further than the recital, and extends to lands which immediately before the passing of the Act had been intended to be so set apart or transferred from the lands of the Crown.

This does not appear upon the evidence to enlarge the language beyond that in the recital. The land in question according to the argument of the appellants was either originally dedicated or set apart shortly afterwards, and nothing was done subsequently, and before the passing of the Act of 1843, to alter that condition of things, so that it either was at that time a military reserve, or it was not; and there was no intention on the part of the Executive to do any act towards setting it apart for such a purpose at that time. But it is said, though not required for ordnance pur-

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poses, it was reserved as a means of communication between the two lakes; if that idea was ever entertained, it was soon abandoned, as we find the Government granting about two miles of the reserve in fee simple to Clark and Street. But however such a reservation as a road for the transport of troops and stores may be regarded from a military standpoint, it would strike an ordinary observer as about as unsuitable a site for such a purpose as could be imagined, exposed as it would be for a great portion of its length to the enemies' fire from the opposite bank; but in truth it was never so used, as we find that the portage road from Queenston to Chippawa was always used after the means of communication were removed from the east to the west bank of the river.

And in connection with this, and to shew the very indistinct notions entertained by the government officials, I may quote an extract from a letter of the Deputy Minister of the Interior, written in 1875, in reply to the clerk of one of the municipalities interested, desiring to be informed, "for what object the chain along the banks of the river was reserved?"—to which he replied:

"It is difficult to answer this question conclusively; but it is generally understood that the chain reserve and the still older Indian portage road on the shore of the Niagara river, were one and the same, and at the time of the acquisition of Canada passed from the French to the English military government, by which in 1856, it was transferred to the Province, now the Dominion of Canada, to be used as a public highway;" an opinion apparently shared by Colonel Coffin, who speaks of it as a road from time immemorial held as a military reserve for the moving of troops and conveyance of stores. And he adds: "I think the fact of admitted and undisputed possession for time out of mind to be sufficient," and ignoring the fact that it was never used for such a purpose and that he confounds it with the portage road, and, overlooking the fact that the Government of Upper Canada had, so far back as 1815, granted about two miles of it, recommends the Dominion Government to sell it.

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I agree, therefore, with the learned Chancellor that no part of the chain reserve was affected by the Act of 1843, but that the title remained in the Crown, subject to such rights as remained in the public over such portions as had by legislation or otherwise become a highway.

This would be sufficient, if I am correct, to dispose of the whole case; but I think this view is confirmed by subsequent legislation.

The opinion had become so general that this was a military reserve, that it is not surprising that even government officials who had had no special reason for scrutinizing the Act of 1843, still continued to regard it in the same light.

In 1852, the principal officers coming to the conclusion that some of the lands purporting, or supposed to be vested in them under the Act of 1843, were not likely to be required for purposes of defence, and that it was deemed most for the public service that such portions should be revested in the Crown for the public purposes of the Province, surrendered a large portion of the reserve on the top of the lower bank, but with the usual want of accuracy pervading their proceedings, included in the surrender the two miles granted by the Crown to Clark and Street in 1815.

In 1855, in anticipation of a further surrender by the Imperial Government of all the Ordnance lands, with the exception of such of those at Kingston, Montreal, and Quebec, as were essential for the military defence of the Province, an Act, 18 Vict. ch. 91, was passed by which it was enacted that whenever the transfer was effected, the lands so transferred should be divided into three classes,—A., which should include the portions of land at Kingston, Montreal, and Quebec, to be retained for occupation by Her Majesty's troops; B., which should be retained for the defence of the Province; C., for sale or lease as the Governor in Council should think advisable.

By the Act of 1856, 19 Vict. ch. 45, the lands and property mentioned in the first schedule to that Act annexed,

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were vested in the Secretary of State for War, and those mentioned in the second schedule, were vested in Her Majesty for general purposes, but subject to be dealt with as provided for in the Act of 1855; and I refer to this Act, chiefly for the purpose of drawing attention to the recital in it, to the effect that at the time of its passing the Ordnance lands consisted of the lands comprised in the two schedules to the Act annexed, in which no mention is made of the chain reserve; but in the first, which refers to the lands remaining vested in the Secretary of State for military purposes, under the head "Niagara," Fort Mississagua, and its glacis and other appurtenances are mentioned; and in the second, being the lands proposed to be transferred to the Provincial Government, we find that the reserve at Niagara, except Mississagua, is mentioned, but no reference is made to the chain reserve.

In the same session an Act was passed respecting the lands required by the Imperial Government, viz., the lands at Quebec, Montreal, Kingston, Niagara and Sorel, and the only land referred to under the head "Niagara" is the fort I have referred to.

Another Act was passed in the same session in reference to the lands transferred to the Province, and there described in the second schedule, which are divided into two classes B. and C. as provided for in the Act of 1855; class B. consisting of such portion as may from time to time be placed there by the Governor in Council, as necessary for the defence of the Province. No reference is made to the reserve, but it is only fair to state that the quantity of land at Niagara is put down at 444 acres, 2 roods, 4 perches, which it struck me at first was an indication that it was intended to include the chain reserve, but on referring to the book prepared by Colonel Ord, this would seem not to be the case, as there the items are given by which that acreage is arrived at.

The return prepared by Mr. Elliott, ordnance storekeeper, as might have been expected from what we have already seen of the view of the Ordnance authorities, con-

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tained the chain reserve; but this, in itself, carries but little more weight than the general opinion so long entertained.

Colonel Coffin, who was the agent employed by the Province to receive possession of the lands surrendered by the Imperial authorities, seems to have been very confident of the right of the Ordnance to the reserve; but his opinion, to use his own words, had no other foundation than rumour, and the fact that in 1852 the Province accepted a surrender from the Ordnance. "It is," he says, "undoubtedly vested in the Ordnance. the Province having accepted title under them—deed 1st October, 1852," but he was apparently so little acquainted with the actual facts that he spoke of it at that time as consisting of a chain wide the whole distance from Niagara to Fort Erie.

Upon this state of facts, I agree with the Chancellor that there is no sufficient evidence of the existence of a military reserve along the bank of the river, and that it did not pass under the Act of 1843; and I place my decision upon this as if I had come to a different conclusion, I should be compelled, I think, to hold that the chain in front of lot 144, to which the lease extends, passed to the Dominion under the British North America Act.

In the distribution of the property to be held by the Dominion or the Province respectively, this, among others, was assigned to the Dominion.

"Property transferred by the Imperial Government and known as Ordnance Property."

Now as I have pointed out, the Imperial authorities when ceding a large portion of the reserve to the Province, expressly excluded that part in front of lot 144, alleging that it was required for the defence of the Province—and it so remained on that theory until the surrender in 1856.

It would seem, therefore, to fall precisely within the words of the Act, and would seem, therefore, to belong to the Dominion.

I quite agree with the report of Sir John A. Macdonald, that the lands surrendered in 1852 belonged to the old

Province of Canada; that I apprehend is too clear for argument; but this land, on the assumption that the lands ever did belong to the Ordnance, so continued until transferred by the Act of 1856; the other lands had, at the time of their surrender, ceased to be required for such purposes. This, on the contrary, was claimed by the Ordnance to be strictly ordnance lands and essential to the defence of the Province.

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But even if that were so, I feel clear that the chain reserve was on the bank, and could not extend to the slope without a violation of all the rules relating to conveyancing. In truth, I do not suppose it would have been urged except upon the assumption that it was a reserve for military purposes, and so should be liberally interpreted so as fully to carry out the intention; but even so, it is difficult to see how an almost perpendicular bank could be utilized for such a purpose, but the claim made by the Department in 1852, when they claimed the whole slope from the upper bank, is a *reductio ad absurdum*, if I may venture so to speak, and shews how untenable such a claim is.

I share the surprise of the learned Chancellor that so much misconception existed so long in reference to this matter; but I entirely concur in the result at which he has arrived.

The appeal should, I think, be dismissed.

OSLER, J. A.:—

I agree with the reasons given by the learned Chancellor in the Court below, and think that the appeal fails.

MACLENNAN, J. A.:—

I have given very earnest attention to the arguments which were addressed to us, extending over many days, and also to the very large mass of documentary evidence in the case, and I am of opinion that the question depends upon the effect of the several Acts passed by the late

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Province of Canada, and that these Acts when carefully examined determine the controversy in favour of the respondents.

The four townships fronting upon the Niagara river along its whole length from Lake Ontario to Lake Erie were originally surveyed and laid out about the year 1787-88, and the surveyor laid out the concession fronts one chain back from the top of the river bank, thus excluding from the farm lots laid out by him, a strip of land not merely extending from the concession fronts to the top of the bank, but extending to the international boundary in the centre of the river. When, therefore, afterwards, grants were made of the several concession lots along the river fronts, the grants, with a very few exceptions, only came to within a chain of the top of the bank, the result being that from lake to lake, with the few exceptions I have mentioned, a strip of land a chain in width on the top of the bank and extending to the international boundary, remained ungranted and vested in the Crown.

It is clear that from that early period to the year 1843 there was nothing to prevent the Crown, and by that I mean the Provincial Government, from dealing with all or any part of this land in exactly the same way in which they were in the habit of dealing with other public lands of the Province, and just as they did actually deal with some parts of it, as, for example, those few instances in which they made grants of concession lots extending all the way to the river, and the grants made to Clark and Street of parts of the unsurveyed strip itself. No parts of it, except at particular points, such as at Niagara, Queenston, Fort Erie and Chippawa, and as to which parts there is no question, were ever used or occupied for any military or defensive purpose by the Imperial authorities, nor was any act done which interfered, or could by any possibility interfere, with the authority and power of the Government to sell and dispose of it like other lands.

In the commission to Governor Haldimand of the 1st of

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September, 1778, power was given to him under order in council to erect, raise and build such and so many forts, platforms, castles, cities, boroughs, towns and fortifications as might be thought necessary, and to fortify them and furnish them with ordnance, ammunition and all sorts of arms fit and necessary for the security and defence of the Province, and also to demolish and dismantle them as might be most convenient. He was also authorized to settle and sell lands by order in council, and to make grants under the great seal of the Province. The same powers had previously been given in similar terms to former Governors, Sir James Murray and Sir Guy Carleton, in 1763 and 1766; but there is nothing to be found in these commissions or in any of the instructions accompanying them authorizing the setting apart of any public lands for future military or ordnance purposes. The nearest approach to anything like the exercise of authority to set apart lands for future military use is to be found in the regulations for the land boards by order in council dated the 17th of February, 1789.

Section 8 of these regulations orders that to prevent monopoly of spots containing mines, minerals, fossils and conveniences for mills and other advantages of a common and public nature, to the prejudice of the general interest of settlers, the surveyor-general and his agents and deputies in the different districts were to confine themselves in the locations to be made by them to such lands as were fit for the common purposes of husbandry, and were to reserve all other spots aforementioned, together with all such as might be fit and useful for forts and harbours or works of defence, or such as contained valuable timber for shipbuilding or other purposes, conveniently situated for water purposes, in the hands of the Crown, and they were without delay to give full and particular information to the Governor and Commander-in-Chief for the time being of all such spots, that order might be taken respecting the same. It was also declared that any certificate of location contrary to this regulation was null and void, and that a

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special order of the Governor in Council was necessary for the granting of any such spots so directed to be reserved. If we suppose that when the survey of the townships on the Niagara river was made a similar regulation existed, which, however, does not appear, and if the land in question was reserved for such purposes, we should expect to find evidence of it among the government records, but no such evidence has been produced, and the only nearly contemporary evidence which exists tends to shew that the land in question was reserved for a road. That is found in the proceedings of the land board of Nassau of the 3rd of May, 1791, in which it is said that the inhabitants occupying the adjacent lands cannot be ignorant that the chain in question had been left by the surveyors for that purpose. If that were so, then the character of this reserve would have been settled conclusively by the Act of the Legislature passed in 1810 (50 Geo. III. ch. 1, sec. 12), which declared that all such reserves should be common and public highways.

It would be impossible within reasonable limits, and it would serve no useful purpose, to attempt to discuss in detail all the documents produced in the case down to the year 1843; suffice it to say that in my opinion no act of any competent authority has been shewn to have been done in that interval to set this land apart for military purposes; and it is clear that there was no use or occupation for these purposes except at the particular points upon the bank of the river as to which there is now no dispute.

Then came the Act of 1843. It recites that land had at various times been set apart from the Crown lands, and had been placed under the charge and control of the officers of Her Majesty's Ordnance, or of the Commander of the Forces for purposes connected with defence and the service of the Ordnance Department, or had been used and occupied for like purposes, and that it might be expedient that what was not wanted might be sold or disposed of; and that it was expedient in order to sale or management, that

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all lands of that description should be vested in the principal officers of the Ordnance in trust for Her Majesty with certain powers. It then enacted that from and after the passing of the Act all lands in the Province immediately before that time vested in Her Majesty, and set apart used or occupied for purposes connected with military defence, or placed under charge and control of officers of the Ordnance, or of the Commander of the Forces, or other military officers, whether vested in Her Majesty for such purposes by cession, or by Her or them set apart or transferred from lands of the Crown, or intended so to be for any such purpose, and more especially (but without intending that specification should exclude any lands within the above description) the lands described in a schedule, should be and were thereby vested in the principal officers of Ordnance. Now, I think it is quite plain from this language, and from the much fuller and more extensive language of the Act itself, for I have endeavoured to condense it, and to express its substance only, so far as it can possibly be held to apply to the land in question, that the Legislature was intending to deal with those lands which were then, that is at the time of the passing of the Act, Ordnance lands as distinguished from other Crown lands, by reason of their being then set apart or used or occupied for the purposes named. I would have thought that was the true meaning and intent of the Act from the language which I have quoted, but I think that it is made still clearer, and put beyond doubt, by the proviso at the end of the enacting section, which declares that the Act shall not extend to vest * * any lands or buildings belonging to the civil goverment of the Province, notwithstanding that they may have been under the charge and control, or in the use or occupation of the Ordnance, or any other military department. I think that makes it clear that whatever lands might have been at some former time under the charge or control, or in the use or occupation, of the military authorities, it was only such lands as were still at that very time set apart or under charge or control, or in use or

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occupation for such purposes, which were intended to be dealt with and vested by the Act. I do not think the enumeration in the schedule helps or hinders that conclusion, for the schedule includes not only the lands at or near the places named therein, but also all lands answering the description in the enacting clause elsewhere within Upper Canada.

It is the description of the lands in the enacting clause which is to govern, and I think it is not shewn that the lands in question did, at that time, answer that description. It is not shewn that they were lands which were then set apart or then used or occupied for the purposes named. There were then at or near all the places named in the schedule, such as Niagara, Queenston, Chippawa and Fort Erie, other lands admittedly answering the description, and although the lands in question were not far from the last named places, they did not answer the description as I have endeavoured to shew.

I think the setting apart referred to in the statute must be some formal dedication or setting apart by competent authority, about which there was or could be no mistake; otherwise it is difficult to understand the meaning of the proviso that actual charge and control, actual use and occupation, by the ordnance or military authorities at any former time was not to be sufficient to bring any lands within the operation of the Act.

There is evidence, however, that after the passing of this Act and in the years 1850, 1851 and 1852, the land in question was by various public officials, both civil and military, considered to be military or ordnance lands; but it was mere matter of opinion, and on the 24th of June, 1850, Mr. Price, the then Commissioner of Crown Lands, stated in a report on the subject that the chain at the top of the bank as distinguished from the slope and the beach, and the water lot *ad medium filum*, "had of late years been regarded as ordnance property."

And on the 1st of October, 1852, an important transaction took place on which the appellants' counsel placed

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great reliance. That transaction was a surrender to the Crown of that date of a portion of the reserve adjacent to the great falls, and extending southward from the point where the land in question in the present action begins. The deed contains a recital that the lands thereby surrendered had been among others, vested in the principal officers by the Act of 1843; and Mr. Robinson contended that the Crown was thereby estopped from afterwards contending that any other part of the reserve was not also ordnance land. The deed is strictly confined in every respect to the parcel surrendered, and therefore can be no estoppel as to other land; but if it were otherwise in ordinary cases, it would not bind the Crown: Everest and Strode on Estoppel, and authorities cited, pp. 8 and 9. But besides, the deed contains a proviso that it was not to be construed to contain any warranty of title or of the right of the principal officers either at law or in equity to surrender the lands; and that it was intended to operate merely to pass the estate or interest which they then had or possibly might have therein, either under the Act of 1843, or otherwise.

In my opinion, therefore, that deed left the question as to the remainder of the lands unaffected, and exactly as it stood before.

What next occurred was the correspondence between the Provincial and Imperial authorities which led up to the Acts 18 Vict. ch. 91 and 19 Vict. ch. 45. The correspondence began in September, 1854, and in the course of it a return was prepared by the Ordnance Office at the request of the Commander of the Forces for, among other things, "a list of the different places where ordnance lands are situated, with the approximate contents in acres, the description of buildings and military works executed thereon, and how acquired by the board of Ordnance, that is by conquest purchase or reserved for military purposes from the Crown lands." That return was made by ordnance storekeeper Elliott on the 1st of November, 1854, and it contains an item No. 23, composed of five particulars, all designated as at station "Niagara," the first

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of which is described as "a chain reserve along the bank of the Niagara river," and under the head of "how acquired," it is stated to be by "reservation." No acreage is mentioned, nor is there any mention of the portions granted to private persons, nor of the portion surrendered by the deed of the 1st of October, 1852. There had been two previous statements prepared of military reservations, one on the 29th of April, 1830, under the hand of Surveyor-General Chewett, and another in 1851 by J. Webber Smith. In Mr. Chewett's schedule the authority for calling it a military reservation is stated thus: "Being a reservation in all the patents along this part of the river," that is the Niagara river, from the mouth of the Welland to Queenston. And in Mr. Webber Smith's schedule he states the reserve as extending from Fort Erie to Fort George, and as 2,760 chains in length and containing 276 acres, but that there is no plan in the office to give any information. These former schedules being on record in the Ordnance Office would sufficiently account for the reserve being included in storekeeper Elliott's report, and it shews that the officers of the Ordnance still supposed that the land in question, or what was left of it, was ordnance land. But instead of affording evidence that it was or ever had been set apart for military purposes, these schedules rather indicate that the only foundation for regarding the land as so set apart, was the reserve in the patents of the adjacent lands, which, however, when referred to, are found to be entirely silent on the subject.

The Act 18 Vict. ch. 91, was passed on the 30th of May, 1855, and was merely preliminary, and need not be particularly referred to. The Act which actually transferred the ordnance lands to this Province was not passed until the following year, and is the Act 19 Vict. ch. 45, assented to on the 19th of June, 1856. Now, I think this Act removes all possible doubt upon the question in this appeal. The preamble recites that: "The ordnance lands within this Province consist at the time of the passing of this Act of the several lands, estates and property com-

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prised in the two schedules to this Act annexed;" and although section 2, vesting the lands which were to be retained by the Imperial authorities in the Secretary for War, not only vests the lands in the first schedule, but also all other lands which were then in any way vested in the principal officers, it is not and, as I understand, has not been contended by any person that the lands in question were intended to be retained by the Imperial authorities, or were intended to be vested in the Secretary of State along with the lands described in the first schedule. The sole contention which has been made is that the lands in question are mentioned in the second schedule, and that they became vested in the Province under and by virtue of the enacting clause in section 6. It is said that the land in question is included in the schedule under the sixth item, described thus:—

Situation.	Approximate quantity of land.			Description of Buildings or Military Works.
	Acres.	R.	P.	
Niagara.....	444	2	4	Reserve, barracks and hospital, all except Mississagua.

The schedule contains other items on the Niagara river, thus: Queenston reserve, 130 acres, except part sold; Chippawa barrack and store, 19 acres; Fort Erie reserve, 1,000 acres. It is suggested that this schedule was prepared from Elliott's schedule above referred to, and is the same in a condensed form; that the acreage is approximately the same, and that the words "reserve—all," include all the chain reserve that was left after the surrender in 1852. I think, however, that this argument is completely answered by a reference to the schedule prepared after the passing of that Act, signed by Colonel Ord. At page 389 of the appeal case, where that schedule is printed, there is a specification of the Niagara reserves, which shews exactly how the 444 acres, 2 roods, 14 perches in the second schedule of the Act is made up, without including any part of the chain reserve. To my mind, the omission of all men-

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tion of the chain reserve, or of the acreage which it contained, from the schedule to the Act, seeing that in all the schedules of the ordnance lands then in existence it was separately and specifically mentioned, is conclusive that it was deliberately omitted from the schedules, and was not regarded by the Legislature as ordnance land. Colonel Ord not only does not include it in the acreage of the Niagara reserve, or as part of that reserve, at all, but puts it in his schedule as a separate and distinct item at page 390. Of course, his setting it down in a schedule of ordnance lands after the passing of the Act could not have any effect upon the construction of the Act.

I am therefore of opinion that upon the proper construction of the Acts above referred to the land in question was not affected by them, and cannot be regarded either as having been vested in the principal officers by the Act of 1843, or as having been revested in the Province by the Act of 1856.

I think also these conclusions are greatly strengthened by subsequent legislation. In 1859 the previous Acts were consolidated and re-enacted in two statutes, Consolidated Statutes of Canada, ch. 24 and ch. 36, without any substantial change. In 1877, by Act of the Dominion, 40 Vict. ch. 8, the lands vested by the Act of 1856 in the Secretary for War were revested in the Dominion. The recital declares that the lands so vested are those specified in the schedule, and the only land at Niagara so specified is Fort Mississagua and land attached, containing nearly 66 acres, 2 roods, 14 perches. It is clear from this Act that Parliament never deemed that the present land passed to the Secretary of State.

Again, by R. S. C. ch. 55, all former acts are repealed and re-enacted, and the schedule is divided into two parts. The first is a schedule of military properties in Canada transferred to the late Province of Canada, and the other part a specification of War Department property transferred to the Government of the Dominion of Canada. There is no specific mention of this chain reserve in either part of

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the schedule. The Niagara land is described in the first part as "reserve, barracks and hospital," 444 acres, 2 roods, 4 perches, and the land at Queenston, Chippawa and Fort Erie, in the same terms, including acreage, as in the original schedule.

I am of opinion, therefore, that the appellants have not made out that the land in question is land which answers the description in the 9th sub-section of the 3rd section of the British North America Act, which it was necessary for them to do in order to sustain their appeal; and that the appeal ought, therefore, to be dismissed.

Appeal dismissed.

City of Ottawa v. Keefer.

City of Ottawa v. Clark.

Municipal Corporations—Public Parks Act—Purchase by Park Commissioners—R. S. O. ch. 190.

A city adopted the Public Parks Act, R. S. O. ch. 190, and park commissioners were appointed who entered into contracts with the defendants to purchase lands for park purposes, and made a requisition on the city for the purchase money. The city refused to recognize the contracts, and brought these actions for a declaration that they were invalid :—

Held, per Hagarty, C. J. O., and Burton, J. A., that the park commissioners had, in the *bonâ fide* exercise of their discretion, the right to enter into the contracts and that the city, so long as the statutory limit was not exceeded, was bound to provide the purchase money.

Per Osler and Maclennan, JJ. A., that the city council had a discretion whether or not to adopt the contracts and provide the purchase money.

In the result the judgment of Rose, J., dismissing the actions, was affirmed.

Statement. These were appeals by the plaintiffs from the judgment of Rose, J.

The actions were brought by the city of Ottawa and one Morris, suing on behalf of himself and all the other ratepayers of that city, to have contracts for the purchase of land entered into between the Board of Park Commissioners of Ottawa and the defendants Keefer and Clark, declared not to be binding on the city.

The actions were tried at Ottawa, on the 15th of October, 1895, before Rose, J., who, on the 27th of January, 1896, gave judgment as follows :—

Rose, J. :—

Several questions have been submitted for the opinion of the Court, which I will endeavour to answer in order.

The ground has been pretty well cleared by *McVicar* v. *Port Arthur*, 26 O. R. 391.

Counsel for the city of Ottawa contended that the board had not conferred upon it discretionary power to purchase lands or to enter into a contract for the purchase of lands so as to bind the city to pay for such lands ; but

Judgment.

ROSE, J.

required the authority of the city to enter into a contract for the purchase of lands, and that a contract entered into by the board without such authority was *ultra vires*. I cannot think that this is the proper construction of the statute. As pointed out in *McVicar* v. *Port Arthur*, the scheme of the Act is that upon a majority of the electors voting in favour of a by-law submitted under the statute, R. S. O. ch. 190, the general management, regulation and control of existing parks, and the parks which may thereafter be acquired and established under the provisions of the Act, are to be vested in and exercised by the board; and by section 13 the board is vested with the power and authority to select and acquire by purchase or otherwise, or to lease, the lands, rights and privileges needful for park purposes, and, by section 14, to contract with the owner or occupier of the land for the purchase or renting thereof or of any part thereof, or of any privilege which may be required for the purposes of the board; and by sub-sections 4 and 5 of section 13, the board is given the power to let any lands not immediately required for park purposes and to sell or otherwise dispose of land not required for park purposes in such manner and upon such terms of cash or credit or part cash and part credit as the board may think most advantageous.

It seems to me that one would be denying to the board the powers conferred upon it by very plain language if the Act is construed so as to declare that the discretion as to acquiring lands by purchase or by lease or of disposing of lands by sale or by lease was vested not in the board but in the city. I am clear that the discretion was vested by the Act in the board, and the board—to adopt the language in *McVicar* v. *Port Arthur*—is a statutory agent of the electors to carry out the provisions of the statute. The board, therefore, acting in good faith—and the good faith in this case is not impugned—had a right to enter into a contract with the defendants Keefer and Clark for the purchase of the lands in question upon such reasonable terms and conditions as the board in its discretion might think best.

Judgment.

ROSE, J.

The city by its statement of claim asserted that the land was not needed for park purposes. That is not a matter which I can inquire into. The discretion is vested, not in the city, nor in the Court, but in the board, and it is not the duty of the Court to attempt to interfere with the internal arrangement of park affairs.

It was further contended that the terms of the contracts were such as to make them unreasonable, and that the Court should declare that such contracts, in consequence of such unreasonable terms, were not binding.

The first term of the contract was that the land was to be accepted "subject to existing leases for the present season of two pasture fields, and also of a lease for ten years of the Canoe Club for a site for their building."

The contract was dated the 16th of June, 1894. It was said, as to the Clark property, there was no pasture field. The action was brought on the 26th of April, 1895. It was stated that the city or board was in possession of the lands. Apart from any such question, however, at the time the action was brought the existing leases for the season of 1894 had expired. So all questions as to them had ceased to exist prior to the beginning of the action. As to the lease to the Canoe Club, whether the contract is to be made subject to such a lease or not could only affect the selling value of the property. There can be therefore nothing in this objection.

The third condition was that "the conveyance was to be subject to a condition that no intoxicating liquors shall ever be sold on these lands." I do not think that such a condition is unreasonable. In the first place, as I remarked in regard to the first term of the contract, it could only affect the selling value of the land, and I must assume, in the absence of evidence to the contrary, that it was taken into consideration by the board in the purchase of the land. Moreover, it seems to be the intention of the Act that intoxicating liquor is not to be sold within the parks, for by sub-section 3 of section 11, the board is given power to let from year to year, or for any time not exceeding ten

years, the right to sell refreshments, *other than* spirituous, fermented or intoxicating liquors, within the park or parks. It is immaterial whether, as contended by the plaintiffs, the conveyance subject to this condition gave the vendors the right of re-entry upon breach, or whether the condition amounts, as contended by the defendants, to a covenant merely, giving the right to invoke the aid of the Court to restrain the breach by the city or its assigns as it is a condition of the agreement, which, I think, could be enforced, and which the Courts would enforce; I am of the opinion however that it is not an unreasonable condition, and that the board acted within its powers in consenting to it.

The fourth condition of the contract was that the vendors were "to be at liberty to remove any stone now quarried on the said lands or wood now cut, and also any fences not required for the park." It was argued that this made the contract uncertain. I confess I do not see the force of the argument. As far as affecting the value of the property purchased, the observations which I have heretofore made would apply. The stone then quarried upon the land, the wood then cut, of course was a certain quantity. The fences not required for the park would be made certain when the board determined how much of those fences would be required for the park.

An objection was made to the condition that if the purchase money was not paid on the 1st of July, 1894, it should bear interest from that date to the 1st of July, 1895, after which it was to be subject to the rate of five per cent. per annum until paid, the payment of principal money to be made on or about the 1st of August, 1895. This is only another way of fixing the value of the property purchased and the amount of the purchase money to be paid, and I would be unreasonably limiting the powers of the board did I declare that it had no judgment or discretion as to the terms upon which it could make a purchase. The words in the Act I have quoted, in my opinion, give such powers, and this objection also fails.

Judgment.

ROSE, J.

The most serious question, and one which has required the most consideration, is the objection that the plaintiff corporation could not pay for these lands without exceeding the limit of one and a half cents on the dollar imposed by 41 Vict. ch. 37, sec. 12, (O.) which provides that until the expiration of the year 1928 it should not be lawful for the plaintiff corporation to assess, levy or collect in any one year on the whole ratable property within such city a rate higher in the aggregate than one and a half cents on the dollar on the actual value thereof, exclusive of the school rates, and that limitation was to be notwithstanding the provisions of the Municipal Act.

The scheme of the Act seems to be this, that the board may purchase lands, notify the city council of the purchase, and that the council must out of the moneys in hand, or to be raised by debentures, pay the purchase money. True, the council is prohibited from levying a rate exceeding one and a half cents on the dollar, but that does not at all determine its power or ability to pay the purchase money required for property so purchased. Such purchase money may come under the head of or may be called uncontrollable expenditure, and may limit the amount available for what may be called controllable expenditure. If the city pay the purchase money of these lands out of income for this year or the next year, it will have less to apply to other purposes. If it raise the money by debentures, keeping within the one-half mill referred to in section 17, it is said by the board that the rate will not exceed the statutory limit. But I do not think I am called upon to determine upon this record, in an action brought to have the agreements made by the board declared *ultra vires*, whether or not the council had at the time of making the contract, or now have, or will have when demanded, the means available to pay the purchase money, or whether it could raise such money by the sale of debentures or otherwise. It seems to me the proper time to discuss that question will be when the council refuses to pay the money, and the vendors find it neces-

sary to invoke the aid of the Court to compel payment. The contract is certainly not *ultra vires* because the city has not the funds in hand out of which to pay. And if it be that the city can resist the demand for the purchase money on the ground that it cannot, without exceeding the statutory limit, raise the money for such purpose, that will be considered if set up in answer to a demand for the payment of the purchase money.

I do not see how it can be said that the fact that the contract provides for a liability not to be met within the year in which the contract is made, in any sense affects the powers of the board to enter into it. Section 17 provides for an estimate to be furnished by the board to the council, but that estimate does not embrace any money which may be required for the payment of the amounts contracted to be paid for lands purchased by the board; that estimate is merely for the money required to pay the interest and the sinking fund of the debentures already issued, and moneys required by the board for the purposes set out in that section; and nowhere do I see it laid down in the statute that the board has to make any requisition upon the council prior to the purchase, or that it is to await the action of the council in procuring the purchase money before it enters into a contract which will bind the council to pay such purchase money.

The words of sub-section 4 of section 17, were relied upon as pointing to a requisition by the board upon the council to raise the purchase money required in advance. The language of such sub-section is, it may be, not well chosen, because there is no provision in the Act for the board reporting to the council any proposed purchase, that is, if the language of such sub-section would convey any such meaning. The language may, however, I think, be fairly construed to mean that the board may make a requisition upon the council to raise the money by debentures for the purpose of paying for lands purchased and which the board has reported to the council were necessary for park purposes.

Judgment.
ROSE, J.

Recognizing, as I think it must be, that the ratepayers, by means of the provisions of chapter 190, have vested in the board the discretion to purchase lands, I do not see how I can place a limitation upon the discretion of the board, acting in good faith, as to the terms which they may agree upon in making the purchase. As I said before, unless the contract of the board was so unreasonable as to suggest bad faith and a misuse of the powers conferred upon the board so as to vex and annoy and unnecessarily burthen the ratepayers, I think the intervention of the Court cannot well be sought for.

If the vendors are obliged to bring an action to compel payment of the purchase money, and can establish the alleged facts stated in the communication sent by the board to the city council dated the 29th of January, 1895, it seems to me that the city will find much difficulty in successfully resisting the claim. I purposely, however, refrain from finding the facts which will then arise for determination.

I think that the plaintiff corporation fails on all grounds taken, and is not entitled to judgment as asked, namely, that declaring the alleged agreement and purchase to be null and void and not binding upon the plaintiff or the ratepayers of the city of Ottawa.

The actions must be dismissed with costs.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 23rd of March, 1896.

Robinson, Q. C., and *MacTavish*, Q. C., for the appellants. The learned Judge was wrong in holding that the appellants were not, until legal proceedings were taken to enforce the contracts by the vendors, entitled to any declaration as to the validity of the contracts, or to an injunction against the further carrying of it out by the respondents, and he was also wrong in holding that the Board of Park Management was the statutable agent of the appel-

lants, empowered not only to buy lands for park purposes for which funds were provided, but also to enter into agreements for the purchase of lands to be paid for in some future year, and that to meet all such obligations the city was bound to provide the money by the issue of debentures or otherwise. The power to issue debentures for park purposes is not compulsory, nor has the Board of Park Management the power to make it so. The city could not incur in any year debts to be paid in a future year without first providing the means of payment, in pursuance of the provisions of the Municipal Act, and it is submitted that the Board of Park Management has not more enlarged powers, under the Parks Act, and its attempts to incur or impose debts contrary to law ought to be restrained. The case of *McVicar* v. *Port Arthur*, 26 O. R. 391, on which the learned Judge relied, does not support his judgment, as there was in that case a by-law of the corporation approving of the purchase, and debentures were actually issued for the payment of the purchase money, whilst in this case there was no act of the city assenting to or approving of the alleged purchase or providing means to pay. The expression in the judgment in that case that the Board of Park Management was the statutable agent of the corporation, now relied on by Mr. Justice Rose as determining this case, only implied that the board was a statutable agent for the purpose of buying lands for which funds were on hand or were provided as in that case; but it should not be taken in any wider sense or held to import that boards of park management have unlimited powers to bind corporations to any amount without their consent. Argument.

Arnoldi, Q. C., and *Chrysler*, Q. C., for the respondents, Keefer and Clark. The alleged inability of the plaintiffs to provide funds for the purchase of the property in question herein does not constitute a sufficient ground for maintaining this action. The Board of Park Management of the city of Ottawa was duly authorized to contract for and to purchase the lands in question herein, and the plaintiffs have no right to interfere with the Board of

Argument. Park Management in the exercise of the powers so conferred upon it.

F. R. Latchford, for the Board of Park Management.

Robinson, Q. C., in reply.

May 12th, 1896. HAGARTY, C. J. O.:—

The Public Parks Act, R. S. O. ch. 190, has been closely analyzed and discussed in the case of *McVicar* v. *Port Arthur*, 26 O. R. 391, relied on by the trial Judge in the present case.

The Board of Park Management became a body politic and corporate after the approval of the ratepayers had sanctioned its institution and its constitution by the action of the Council, and it possessed the power and authority (under section 13) to acquire by purchase or otherwise or to lease lands needful for park purposes.

So long as it acts in good faith under this authority I see no right either in the municipal council or others to interfere with its discretion.

I agree with the judgment of my brother Rose as to the objections taken to the nature of the contracts for the purchases from Keefer and Clark, such as the restriction as to the sale of spirituous liquor, the removal of stone, as to the fences, as to certain pasture fields, or rights in a canoe club, and as to interest; all these were, as he held, matters in the discretion of the board, and not in that of the municipality. There was nothing apparently unreasonable in them, and their adoption or rejection may have influenced the price payable for the land taken.

The chief stress of the plaintiffs' argument bore upon the financial state of the case. As I understand the evidence, and the admission on the argument, the corporation before the adoption of the Parks Act were limited to an annual assessment not exceeding one and a half cents on the dollar, exclusive of school rates. The Parks Act allows them to levy a special annual rate not exceeding one-half mill on the dollar for a Park Fund rate.

Judgment.

HAGARTY, C.J.O.

They were also empowered to raise by a special issue of debentures the sums required for purchasing land necessary for park purposes; the debentures to run for such periods as the council think fit, not exceeding forty years, not to be sold below par and not to bear more than six per cent.

The title of lands purchased is to be taken to the city. I understand that to keep the entire assessment within the cent and a half limit, including the annual one-half mill, the debentures for these purchases must run to the forty years' limit.

There is great force in the reasoning of the trial Judge against the right to maintain this suit to set aside the contracts of purchase.

Before the council could be called on to furnish money to pay for the land, it would seem that the title should be perfected to the city and ready to be handed to them, as required by the Act, so that the transactions could be at once completed by payment of the money.

Beyond making the contracts nothing has been done beyond some correspondence. The plaintiffs now claim that the contracts should be declared void, and that the agreements should be declared not binding on the city, and ask an injunction against further proceedings with the alleged purchases.

I am unable to see any right on the city's part to ask for such relief. I cannot see that the board in any way exceeded its powers or that the contracts are not valid.

The learned Judge's remarks on this branch of the case may be referred to.

[The learned Chief Justice read them and continued:]

I think the learned Judge was right in his disposition of these cases, and his reasons therefor are fully satisfactory to me.

The appeals should be dismissed.

This course will not prevent any legal defence which the municipality may urge when called upon by legal process to provide funds for these purchases.

Judgment.

BURTON, J.A.

BURTON, J.A.:—

Before the passing of the Public Parks Act, R. S. O. ch. 190, and in all cases in which that Act has not been adopted by the city or town interested in the manner provided by that Act, all parks were under the control and management of the council of the town or city, respectively, who could pass by-laws for the purpose of acquiring lands for park purposes, for the erection of buildings thereon, and for their management generally.

But if the ratepayers desired that they should be placed under different management, they could, by adopting the course therein pointed out, have the general management, regulation and control of all existing parks and of all parks thereafter to be acquired, transferred to, vested in, and exercised by a separate board, to be called the Board of Park Management, which is made a separate and distinct corporation with power to make by-laws for the management of the property acquired or to be acquired, and to select and acquire by purchase or otherwise lands for the purpose, the title to which was, however, to be taken to the city, but the power to sell or dispose of such land, if found not to be required for park purposes, was still to remain in the park board.

A great deal of the argument before us was taken up with a point with which I agree with the learned Judge below we are not directly concerned at present, but which, I think, has proceeded upon a misinterpretation of subsection 3 of section 17 of the Act.

As I have already remarked, the scheme of the Act was to take the power of acquiring lands for parks altogether from the city and to place it in the hands of an entirely independent corporation, the only limit to whose power was that the lands acquired should not exceed 1,000 acres in extent, and the sum which they were authorized to require the city to raise in any one year for all park purposes should not exceed one-half of a mill in the dollar.

To enable them to comply with these conditions it be-

Judgment.

BURTON, J.A.

came necessary for them to have power to call upon the council to issue debentures to be called "Park Fund Debentures," which the city was authorized to issue without submission to the people, in case the annual sum required to meet the annual interest and sinking fund did not, with a reasonable allowance for the annual expenses of management, exceed the limit of one-half a mill.

When the sub-section referred to is carefully examined, it is clear, I think, that it was not intended to provide that the one-half mill rate should not be in excess of the statutory limit of two cents, but, on the contrary, it was intended that it should be permissible and obligatory to raise it on the requisition of the park board, even though in excess of the two cents in ordinary cases or one and a half cents in the case of this city.

The language of the section is: "The council shall, in addition to all other rates and assessments for municipal purposes, levy and assess in every year a special annual rate sufficient to furnish the amount estimated by the board to be required for the year, but not exceeding one-half mill in the dollar," and then proceeds: "The said rate shall be deemed to be included in the limit of two cents on the dollar authorized by the Municipal Act."

It is not, I am free to say, the happiest mode of expressing the idea that it is in addition to the two cents, but I think that is clearly its meaning. Had the Legislature intended to say that the previous restriction was to apply to this rate, nothing would have been easier than to say so in clear language, such as "provided that the levying of the said rate shall not raise the whole assessment beyond the two cents provided by law," or some similar mode of expression.

The section first authorizes the levy in addition to all other rates of this special rate, and then adds the words shall be deemed to be included—not that it shall be included. The only reasonable construction seems to me to be that, in order to get over the apparent conflict with the general law or the special law, it shall be presumed to be

Judgment.

BURTON, J.A.

included in the two cent limit in the one case and the one and a half cent limit in the other, and such presumption shall be an irrebuttable presumption, no enquiry into that fact being permissible.

The clause had already authorized the imposition of this rate of a mill and a half in addition to all other rates, and would in itself have been sufficient to warrant the rate in addition to the rates previously authorized, and the declaration in question seems to have been added *ex majori cautelâ*, although it might have been made in clearer language.

The whole Act seems to shew that it was intended to extend the limit in cases of this kind beyond the sums limited by the general law or any special law. The debentures were (section 17, sub-section 7) to be a lien and charge upon all lands which were subject to the control and management of the board.

Notwithstanding the charge, the board could sell free from it, but the money was to be applied to the payment of park debentures.

The council are authorized to retain as a first charge the amount required to pay the interest and sinking fund—all tending to shew a rate separate and apart from the ordinary rates, and not included in the two cent rate.

And in the form of debentures, the sum is borrowed on the credit of the special rate.

But the strongest confirmation of this view is to be found in the fact that the Legislature never could have intended to confer these large powers upon this separate corporation and then leave it in the power of the city to frustrate its operations by simply exhausting its powers of levying a further rate by assessing for general purposes to the full two cents' limit, and in a thousand other ways. It is clear to my mind that the board was perfectly independent of the corporation in its powers of raising money, and that the corporation was bound to act on its requisition.

I am of opinion, therefore, that the limit under the

general law, or under the special enactment applying to the city of Ottawa, has no application to the rate which the park board can require the city to raise for the purposes of the purchases. Judgment. BURTON, J.A.

If I am right in this view, the question is much simplified, although there is nothing before us to shew that the rate, if debentures having forty years to run were issued, would raise the rate beyond the cent and a half to which by its special Act the city was limited.

The board were, I think, clearly within their rights when they made this purchase, and I agree with the learned Judge below that there is nothing in the objections raised, and, so far from thinking that the park board were bound to wait until the city had funds available, it seems to me to be more in accordance with the scheme of the Act to conclude the purchase before making a requisition on the city.

For these reasons I think we should dismiss this appeal. This does not, in my opinion, interfere in any way with the rights or liabilities of the vendors or the city in any proceedings to recover the purchase money.

I see no substantial distinction between the two cases, and I think both should share the same fate.

OSLER, J. A. :—

As regards the establishment of a park in the first instance, after the adoption by the council of the Public Parks Act, or the purchase of land for park purposes in addition to parks then existing, it appears to me, upon the best consideration I have been able to give to the Act, which is very loosely and inartificially framed, that the powers of the Board of Park Management are necessarily circumscribed and controlled by their power to force the council to provide the purchase money. They are, of course, not themselves liable for it, they have no means of raising it directly, and it must, if provided at all, be provided by the council, who, if they do provide it, must pay it out on the orders

Judgment.

OSLER, J.A.

of the board. The central clauses of the Act are to be found in the 17th section, of which sub-section 4 is the first which directly refers to the subject of providing a fund for the purpose of purchasing land. Reading that with the 5th and contrasting it with the 3rd sub-section I am of opinion that the Legislature have placed it in the discretion of the council to determine whether they will or will not provide a fund for the purpose of purchasing the lands and privileges which the board report (which I think means, report to the council) necessary for park purposes. The language is permissive, "the council may raise," etc., as contrasted with clause 3 which declares what they shall do with regard to the requisition mentioned in clause 1, viz., the requisition for the estimate for (*a*) interest on money borrowed, *i.e.*, the park fund debentures; (*b*) the sinking fund for the same, and (*c*) the expense of maintaining, improving and managing the parks, boulevards, avenues and streets, under their control. Moneys required for these purposes the council must raise.

Then sub-section 5 strengthens the argument that the providing of the purchase money is in the discretion of the council, and that the right of the board to require them to do so is not absolute. It shall not be necessary to submit to the electors a by-law authorizing the issue of debentures in case the annual sum which they will be obliged to provide under sub-section 3 does not exceed the limit of half a mill on the dollar. If it will be more than that the by-law must be submitted, and if submitted the ratepayers may reject it and then the money cannot be procured. If, when submitted to them, the ratepayers may reject it, and so reject the requisition of the board to provide a fund for purchase money of the lands they report necessary for park purposes, can their requisition be of higher efficacy when the by-law need not be submitted? And are not the council, even in that case, at liberty to submit if they think proper? It appears to me with all deference that this is the intention of the Act. The board may contract to purchase, but they must first

Judgment.

OSLER, J.A.

assure themselves that the council will provide, or have provided, the purchase money. If they enter into a contract without having so assured themselves there is no hardship upon the vendor, as he must know that the board cannot raise the purchase money themselves and are dependent upon the council.

No other means of providing purchase money than that mentioned in sub-sections 4, 5 and 6, is provided by the Act, and whether the council will so provide it has been, and I think with great good reason, entrusted to their discretion.

The question then arises whether the plaintiffs are entitled to any relief. It is said that the actions are premature but, with deference, I do not think so. They were commenced, one in April, the other in May, 1895, a few months before the last day fixed by the contract for the payment of the purchase money. It is significant that in their statements of defence, filed after that day, the defendants do not counterclaim, as they might have done, for specific performance of the agreement and payment of the purchase money but merely submit their rights to the Court and ask that if the contracts are set aside the plaintiffs should be ordered to pay interest and damages for the board having entered into possession. The defendants, in effect, ask the Court to pass upon their right to compel the council to provide the purchase money, the time for the performance of the contract has arrived and the city has taken its stand denying the obligation sought to be forced upon them thereby. All parties interested are before the Court, and the case is in as favourable a stage as it can ever be for disposing of the question of the city's liability to provide the means for the carrying out of the contracts and the determination of the rights of all parties in respect of them. I think we ought to decide them and not to leave them open for further litigation in the shape of an action for specific performance or a mandamus to compel the city to provide the money.

I must add that, so far as the corporation of the city

Judgment.

OSLER, J.A.

of Ottawa is concerned, I think their power to raise money for the purposes of the Board of Management is controlled by the 12th section of the Act to consolidate their debenture debt, 41 Vict. ch. 37 (1878), and that, except within the limits of that section, they cannot assess a higher yearly rate than one and a half cents on the dollar on the ratable property within the city. That appears to me to be the effect of section 22 of the Public Parks Act, which enacts that it shall, on being brought into force in any municipality, be deemed to be incorporated with the Municipal and Assessment Acts for the time being affecting such municipality. I do not read this limitation as relaxed by the last clause of sub-section 3 of section 17, which provides that the park fund rate, *i.e.*, the rate which the council must raise, "shall be deemed to be included in the limit of two cents on the dollar authorized by the Municipal Act, exclusive of school rates."

The plaintiffs are, I think, entitled to a declaration that under the circumstances the contracts which the park board have assumed to enter into are not binding upon them and that they are not compellable to provide the purchase money of the lands which the board have assumed to purchase. To this extent the appeals should be allowed.

MACLENNAN, J. A.:—

After much hesitation, and not without some doubt, I have come to the conclusion that these appeals ought to succeed.

The Act makes the board a corporation, and by section 13 it is given "power and authority to select and acquire by purchase or otherwise, or to lease, the lands, rights and privileges needful for park purposes;" and by section 14 it may "enter upon the lands of any person, etc., and may contract with the owner, etc., for the purchase or renting thereof." By section 15, it may arbitrate with the owner in case of disagreement respecting purchase money; and by section 16, the arbitration clauses of the Municipal Act

Judgment.

MACLENNAN, J.A.

are to apply as if the board were named therein instead of the council.

In all these matters the board is apparently made completely independent of the council; and the only limitation of the power of acquiring land for park purposes, appears to be the number of acres mentioned in section 13, and the annual rate for interest, sinking fund, and expenses of maintenance, etc., which is, by section 17 (3), restricted to one-half mill in the dollar of the municipal assessment. The board, however, is not to exercise these powers for its own benefit, for the title of all lands purchased, is to be taken to the city or town, section 13 (3), and the lands when acquired, are to be open to the public free of all charge: section 3.

The board, as a corporation, has no money or other means wherewith to pay for the lands which it is authorized to contract for or expropriate. The purchase money in either case must come from the city or town. There is no authority given to the board to contract in the name of the municipal corporation; and I think it is evident the intention of the Act is that whatever the board does, it does as a corporation and in its own name. What then is the position of a vendor having contracted with the board for the sale of land?

If the power of the board is limited solely by the number of acres, and the one-half mill of assessment, then it might have contracted to buy from these defendants for cash, or for cash payable say at the expiration of ten days, with an accepted title. On default the vendor could then sue the board in its corporate capacity, and obtain a judgment and execution. Such a judgment and execution, however, would be of no use, for the debtors have no available property. Could the vendors then upon tender of conveyances to the city, require payment, and on refusal have an action either at law or in equity against the city therefor? If the municipal corporation is bound by the contract, it would seem to follow that it must be liable to pay; and if liable to pay, its liability must be by virtue of the statute;

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MACLENNAN, J.A.

and therefore it must be a legal, and not an equitable liability. I think the question involved in the appeal comes to that, namely, whether the vendors could in such a case as I have supposed, sue the corporation for the purchase money. If they could, the corporation having no defence, must submit to immediate judgment and execution for the full amount of the debt, although no provision whatever had been made for it, and although the first intimation the defendants might have had of any such claim might have been the tender of the conveyance and the demand of payment. For there is no duty cast upon the board of notifying the city council of any purchase they may make, or of the terms of payment agreed upon.

But then section 17 is relied upon, and it is contended that it makes provision for payment by the city. Sub-sections 1, 2 and 3, are referred to. These sub-sections, however, provide for what is to be done, not for the purpose of carrying out a contract of purchase still *in fieri*, but for the purpose of repaying money which has been borrowed and applied on a purchase which has been completed. The remaining sub-sections are then invoked, particularly sub-section 4. That sub-section is as follows: "The council may also, subject as hereinafter provided, on the requisition of the board, raise by a special issue of debentures of the municipality, to be termed Park Fund Debentures, the sums required for the purpose of purchasing the lands and privileges reported necessary for park purposes." It was argued that the word "may" in the sub-section had an obligatory force and that the municipal council had no option but to pass a debenture by-law to raise the money required for such a purchase.

It is noticeable, however, that in sub-sections 1, 2 and 3, which relate to liabilities actually incurred, the Legislature uses the word "shall," and then when sub-section 4 is reached the word "may" is used. I think we ought not lightly to construe "may" as "shall." There is no great hardship in a purchase of land requiring the sanction and approval of the real purchaser before he can be compelled to carry it out, and I think the word "may" in this section

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MACLENNAN, J.A.

need not, and therefore ought not, to be construed as obligatory, and that the sub-section contemplates that any purchase to be made by the board is to be subject to the approval of the city council. The debentures are to be issued to raise the sums required for the purpose of purchasing the lands reported necessary for park purposes; I think that means reported by the parks board. Therefore the parks board are to report a sum which they deem necessary for the purpose of purchasing; and I think that language means that the money is to be applied for and provided before any purchase is made.

The next question is whether in case the parks board do make such a requisition it is then obligatory on the council to provide the money. I think it is not. The Legislature has not said so. In a case like the present, in which one of the sums to be paid is $34,000, the plaintiffs could not provide it without issuing debentures, and what the Legislature has said is that they may do so, not that they shall, and unless the obligation is found in that word, it is not to be found elsewhere in the Act. I think, therefore, if a contract is made before report to the council, and before the council has had time and opportunity to issue the necessary debentures and to borrow the money, it can only be made provisionally, and subject to the approval, ratification, and adoption of the council. I think that conclusion is strengthened by reference to the forms of by-law provided in the schedule (form C.) for the issue of debentures. It recites that "a sum of $ is required for the purpose of acquiring lands * * for the said park, as appears by the special estimate for that purpose furnished by the Board of Park Management to the council." It is not for the purpose of paying for land already acquired by the board, but for the purpose of acquiring lands as appears by the special estimate furnished by the board. Besides, a by-law being required, *primâ facie*, every member of the council is bound to exercise an honest judgment whether to vote for it or not; and one should require to see very clearly that the Legislature had made

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MACLENNAN, J.A.

the passing of the by-law an obligatory act on the part of the council before we could take away the legislative discretion conferred and imposed by law upon the members.

I therefore think, upon the whole, that the alleged contracts are not binding on the plaintiff corporation, and that it is entitled to a declaration to that effect. The appeals should therefore be allowed.

Appeals dismissed, the members of the Court being divided in opinion.

DRENNAN v. CITY OF KINGSTON.

Municipal Corporations—Highways—Ice on Sidewalk—57 Vict. ch. 50, sec. 13 (O.).

A street crossing in the line of and joining parts of a sidewalk on opposite sides of the street is not a sidewalk within the meaning of 57 Vict. ch. 50, sec. 13 (O.).

On the street crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured :—

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that the municipality was not liable.

Per BURTON, and OSLER, JJ.A., that there was evidence of negligence to go to the jury.

In the result the judgment of the Common Pleas Division was affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the Common Pleas Division.

The plaintiff, who was a medical student, slipped on a street-crossing in the city of Kingston, on the 8th of February, 1895, and broke her leg, and brought this action to recover damages. The crossing was in the line of, and joining, the sidewalk on each side of the street. A by-law of the city required occupants of houses to remove snow from the sidewalks. From the snow being thus removed, and from the action of passing sleighs, snow had been heaped on the crossing, and there was a descent of some

inches from the crossing to the sidewalk, the snow on this descent being at the time of the accident hard and slippery. The plaintiff was taken to the hospital when the accident happened, and was confined to bed for several weeks, but was able to pursue her studies. No notice was given to the defendants. The action was tried at Kingston, at the Autumn Assizes, 1895, before MEREDITH, C. J., and a jury, when a verdict was given in the plaintiff's favour for $1,500; and this was, on the 3rd of December, 1895, upheld by the Common Pleas Division. Statement.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of March, and 1st of April, 1896.

Walkem, Q. C., and *Shepley*, Q. C., for the appellants. The want of notice is fatal. Ignorance of the statutory direction can be no excuse, and that is the only excuse offered. There was no physical or mental incapacity. True, the Judge presiding at the trial has a discretion given to him, but that discretion must be exercised reasonably and not arbitrarily. There would be no use requiring notice if suffering from the result of the accident is to be an answer. Compare the cases under the Workmen's Compensation for Injuries Act, *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300; *Mason* v. *Bertram*, 18 O. R. 1; Digest of Cases under the Employers' Liability Act, pp. 187, 192. It cannot reasonably be contended that there was "gross negligence" on the part of the defendants, within the meaning of sub-section 1 of section 531 of the Municipal Act, 55 Vict. ch. 42 (O.), as amended by 57 Vict. ch. 50, sec. 13 (O.). That amendment was passed to relieve municipal corporations from responsibility for accidents such as that by which the plaintiff was injured, and the character of the duty with respect to sidewalks in winter time, which was formerly imposed on municipal corporations, is by the amendment in question materially changed. The Legislature in making the amendment

Argument.

evidently intended to lessen the burden theretofore resting upon municipalities, in cases arising out of the ordinary climatic conditions of the country. Otherwise the word "gross" may be read out of the statute. A fair illustration may be drawn from the law of bailments. A gratuitous bailee, being bound to exercise only slight diligence, is liable only for gross negligence. The statute, evidently, by the imposition of liability for gross negligence only, intends to place municipal corporations in the category of persons held to slight diligence only, in the class of cases to which the statute applies. But even if the amendment in question makes no alteration in the law, there was no evidence here proper to be submitted to the jury that the appellants were guilty of any negligence. A great deal of evidence was given and allowed at the trial which related to the general condition of the crossing where the accident occurred, and at times other than the time of the accident. This evidence the appellants contend was not relevant, the simple question being whether the appellants were liable for negligence by reason of the existence of a slight descent at the end of the crossing. The evidence shewed that the appellants did not create this declivity, nor had they notice of it, nor was there anything negligent, improper, or unreasonable, in permitting its existence, nor were the appellants bound to assume that it was dangerous: see *London* v. *Goldsmith*, 16 S. C. R. 231; *Forward* v. *Toronto*, 15 O. R. 370; *Ringland* v. *Toronto*, 23 C. P. 93. This is not like the case of *Derochie* v. *Cornwall*, 21 A. R. 279; 24 S. C. R. 301, but is like the exception put there in 21 A. R. at p. 281. The test of liability is whether an indictment would lie.

J. B. Hutcheson, for the respondent. The amendment referred to by the appellants does not apply to this case: Firstly; because it is restricted in its application to accidents owing to snow or ice, while the accident was caused not by snow or ice alone, but by ice coupled with improper construction of the crossing; and, Secondly; because it is restricted in its application to accidents on sidewalks,

while this accident occurred on the crossing. This contention is not merely technical; the city assumes the care of its streets and crossings, while the ratepayers are compelled to keep the sidewalks adjoining their premises reasonably free from accumulation of snow or ice. But if the statute applies, the want of notice is no bar. The Act confers on the Judge a discretion to dispense with notice if in his opinion two things are made to appear; (*a*) reasonable excuse for want of notice; and (*b*) no prejudice thereby to the defence. The appellants conceded at the trial that they were not prejudiced by the failure to give notice, and the Judge found that there was reasonable excuse, it being undisputed that the plaintiff was confined to the hospital for many weeks, and was suffering severely for more than thirty days, so as to be entirely unfit to seek legal advice. There is really no difference between "negligence" and "gross negligence," but if there is a difference, it is only in degree, and the question is still for the jury, and there was ample evidence to support the finding. Argument.

Shepley, Q. C., in reply.

May 12th, 1896. HAGARTY, C. J. O.:—

Princess street in Kingston is crossed by Montreal street, and a granolithic pavement crosses the latter street on a down grade from north to south. At the south-east corner it joins or connects with the east sidewalk of Princess street. At that point the snow, under a city by-law, was habitually swept from the sidewalk adjoining upon the crossing, and the passage of sleighs had the effect of pushing or forcing the snow on or at the crossing upon or to the end of the sidewalk, which sloped somewhat from north to south. The result was that where the sidewalk met the crossing, the snow and ice had accumulated and for from three feet to two feet back there was a descent to the crossing of six or seven inches in the yard, and this descent was slippery.

The plaintiff (after dusk) was coming down Princess

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HAGARTY, C.J.O.

street on the east side. At Montreal street she came over the crossing from north to south, and as she walked along to reach the sidewalk she had to pass over this raised surface, and slipped on this incline, receiving some serious injuries.

For this she brings this action against the city on their statutable liability as caretakers, etc., of the streets, and has recovered a verdict of $1,500.

The case was tried as if the statute of 1894, 57 Vict. ch. 50, sec. 13 (O.), was in force, which exempts corporations from accidents arising from persons falling owing to snow or ice upon the sidewalks, unless in case of gross negligence, and requiring a notice within thirty days, etc.

But on the evidence it seems not easy to apply the statute, as the plaintiff's statement is explicit that she did not fall on the sidewalk, but on the crossing in passing to reach, and before she reached, the sidewalk.

I prefer to treat the case on the unamended general law, which is certainly more favourable to the plaintiff. The late Act may, however, be referred to as indicative of the desire of the Legislature to mitigate and lighten in some degree, the very onerous liabilities to which municipalities are subjected under the law creating this civil liability for the state of the highways.

We have so often had to comment on and review cases in which recoveries have been had for accidents on highways, that it is hardly necessary again to discuss the subject in general.

We are now face to face with the question whether the presence of snow on a road or street raised by the action of vehicles and partly by the law-compelled sweeping or cleaning of sidewalks, so as to be raised as here to a higher limit than the sidewalk, presenting a slippery descent of six or seven inches in the distance of from three to two feet, creates a cause of action against the city by an accident to a passenger slipping thereon.

In *Goldsmith* v. *London*, I and another Judge in this Court held that there was no cause of action, the side-

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HAGARTY, C.J.O.

walk being three or four inches above the level of the crossing, and the plaintiff stumbling thereat and being injured thereby.

The Supreme Court held (16 S. C. R. 231) that no action lay, refusing to hold that municipal bodies are bound by law to make a street crossing meet the sidewalk on the level. All the Judges concurred.

Here the crossing was some inches higher at the point of contact with the sidewalk.

When this accident occurred, in February, the natural state of the crossing and sidewalk was to be covered with snow.

As Sir J. Robinson said in *Stewart* v. *Woodstock, etc., Road Co.*, 15 U. C. R. at p. 429: "Letting snow lie on a macadamized road does not in our opinion come under the notion of suffering the road to go out of repair."

The often cited case of *Caswell* v. *St. Mary's, etc., Road Co.*, 28 U. C. R. 247, held that on a toll road where a space two or three rods long was from accumulation of soft snow in a very dangerous state, as distinct from the rest of the road, after sleighs had been over it, and it could easily have been put right, the corporation was liable for an accident.

The late case of *Derochie* v. *Cornwall*, 21 A. R. 279; 24 S. C. R. 301, is very distinguishable. The Supreme Court, Gwynne, J., dissenting, held the town responsible. The sidewalk there from bad construction or age had sunk down so as to allow water to accumulate, and in consequence ice formed and caused the accident. As the Chief Justice said, he did not consider that the weather alone caused the formation of the ice, for without the structural defect there might have been no ice on the spot.

Here the argument for the plaintiff seems to be that it was actionable neglect not to have remedied this slippery descent from the crossing to the sidewalk. Probably there may have been a dozen or a hundred equally slippery spots in the city where people might have accidentally slipped and been injured.

I cannot believe that the Legislature in creating

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HAGARTY, C.J.O.

this statutable liability to persons injured intended to make the municipalities throughout Ontario insurers (as it has often been remarked) of all persons against injury from the slippery surfaces of ice in winter. The roadway, or a portion of it, had become some inches higher than the sidewalk; there must have been a step or slope to connect the two. We all know from daily experience that in the most frequented portions of the city we constantly have to step on ice, and without care are in constant danger of slipping, especially when the frozen surface inclines from the level. It seems to me utterly unreasonable to expect a corporation to insure against all slips occasioning bodily injury, and if the law sanctions such a burden the sooner the law is amended the better.

Some years ago Mr. Justice Gwynne considered that the civil liability of the municipality only existed where an indictment for non-repair would lie. My learned brother Burton appears to adopt that view in *Derochie* v. *Cornwall*. 21 A. R. 279. The statute says that the corporation shall keep in repair, and besides being subject to any punishment provided by law shall be civilly responsible for damages, etc.

I incline to the opinion that the civil liability is commensurate, as it were, with "the punishment provided by law," viz., an indictment.

I cannot believe that an indictment would lie against the city on such evidence as is given here.

Nor can I hold that the defendants were bound during a severe winter to guard against all inequalities in the snow-covered roadway. In many spots there might be slopes of frozen and slippery ice, caused by the winter travel, or possibly by the inevitable shovelling away of snow from the sidewalks. The temperature on the day in question was some degrees below zero. Nothing but a constant flattening down or levelling of the snow facing the roadway could prevent such spots or sloping irregularities on the surface on which passengers might readily slip.

If the whole roadway was raised by a snowfall, say a

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HAGARTY, C.J.O.

foot above the daily swept sidewalk, I cannot believe that the corporation is bound to see that the sidewalk, straight or sloping, either has a safe step to it or that it is not slippery.

I do not think the law requires any such care or duty on the defendants' part. The existence of this small declivity was not the work of the defendants. The action is for nonfeasance. Although other passengers had slipped on the same spot, no one had thought it worth reporting to the city authorities, so that they should have notice of its state. The serious injury to the plaintiff might have happened to any one slipping on sloping ice. It was her accidental misfortune, and she is entitled to much sympathy, but I think from all our experience in life we must look on such matters as purely accidental, and such as all the inhabitants of a city are daily liable to.

It may be and often is urged that the measure of what is and what is not negligent omission, is a matter wholly for the jury.

It is certainly the duty of the Court to decide whether there is evidence on which a jury of men reasonably desirous of deciding rightly can find for the plaintiff. I say it, with regret, from a painfully long experience, that in many of this class of cases leaving it to the jury is simply to direct a verdict for the plaintiff.

The opinion that the party injured ought to get something from somebody too often prevails. In England, as far as I know, there is no such civil responsibility as prevails here and in the United States, and I do not think the safety or convenient use of the roadway is thereby diminished.

BURTON, J. A.:—

This action was launched as one brought under the amended Act of 1894, which provides that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon sidewalks, unless

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BURTON, J.A.

in cases of gross negligence by the corporation, and that no action shall be brought to enforce a claim for damages under that sub-section, unless notice in writing of the accident and the cause thereof has been served upon the corporation within thirty days after the happening of the accident; and provided also that the want or insufficiency of the notice shall not be a bar to the action if the Court or the Judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice, and that the defendants have not thereby been prejudiced in their defence.

It is scarcely correct to say that the plaintiff admits in her statement of claim that she did not fall upon a sidewalk, on the contrary, I read her statement very clearly to charge that she did fall upon the sidewalk, although that sidewalk formed a crossing on Montreal street. She alleges that the defendants have built a granolithic crossing in line with the sidewalks on each side of Princess street, so as to afford a continuous sidewalk or footway along each side of that street.

Now it appears that the corporation have built granolithic sidewalks on each side of Princess street, extending across the intersecting streets, so as to form a continuous footway for pedestrians along the whole length of the street. It was not at all an unreasonable view for the plaintiff and her advisers to take, that the place where she fell was on the sidewalk. I was at first of that impression, and it was only on finding that the Act draws a distinction in many of its sections between crossings and sidewalks, that I have come to change my opinion.

The case was treated throughout the trial as coming within the Act, but the learned Chief Justice left the question of negligence and gross negligence to the jury, so that if for any reason it was found not to be within the statute, it should not be necessary to take the case down to trial again, and the jury found that the corporation were guilty of gross negligence.

The question as to the place of the accident being a sidewalk was, I think, not raised until afterwards.

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BURTON, J.A.

Having come to the conclusion that a distinction is drawn in the Act between sidewalks and crossings, I am relieved of the necessity of what would have proved, I fear, to be the troublesome question of whether there was evidence to warrant the conclusion at which the learned Chief Justice arrived that there was a reasonable excuse for not giving the notice in this case, and the not less troublesome enquiry of what is meant by gross negligence in reference to the conduct of the corporation or its officers in matters of this nature.

It may be mentioned in this connection that the Legislature has repealed so much of the enactment as empowered the Judge at the trial to dispense with the notice and has limited the time for giving notice to seven days.

But I am quite unable to concur in the view that there was no evidence of negligence to go to the jury.

I have always been of opinion that Sir John Robinson took the correct view of the law when he expressed the opinion of the Queen's Bench, that allowing snow to lie on a highway did not come within the meaning of the statute which made a municipality liable for suffering a road to go out of repair.

I have always regretted that that construction of the statute was ever departed from.

It has, however, been overruled by all the Courts, and the Act of 1894 is a statutory recognition of those decisions which held that the non-removal of snow or ice was suffering the highway to be out of repair, but simply reduced the liability by declaring the municipality to be only liable for gross negligence, whatever that may mean. If the case is not within the Act, it was only necessary to establish such negligence as was sufficient to create the liability before the Act.

With very great deference, I think that in some of the cases decided the evidence ought not to have been deemed sufficient to justify a submission of the case to the jury, but verdicts obtained upon such evidence have been repeatedly sustained and are now binding upon all the Courts.

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BURTON, J.A.

The evidence is all one way as to the state of the crossing, so that in accordance with the decisions it was out of repair, and the sole question was as to whether there was any evidence proper to submit to the jury of negligence on the part of the corporation.

In *Boyle* v. *Dundas*, 25 C. P. 420; 27 C. P. 129, which was twice tried, once before myself, there was an inch or an inch and a half of snow upon the walk, which rendered it difficult to see where the hole was which was relied upon there as the want of repair. There was no evidence of notice to the corporation, but the defect existed for some time before the accident from which, according to the decisions, the jury were at liberty to infer knowledge on the part of the corporation, and therefore of negligence in not repairing, and I refused to non-suit. The jury found a heavy verdict.

The Court, mainly on the ground that the damages were excessive, granted a new trial. On that trial a much smaller verdict was rendered and the Court refused again to interfere.

In *Mason* v. *Peterborough*, (unreported; but see 20 A. R. 683); the sidewalk was on the side of a hill, and it was contended that there was discovered upon taking the levels a slight incline, one end of the sidewalk being a trifle higher than the other, but this was not apparent to the eye without taking the levels, yet it was held that the case could not be withheld from the jury.

Perhaps one of the strongest cases in which a case was allowed to go to the jury, was that of *Moxley* v. *Canada Atlantic R. W. Co.*, 14 A. R. 309; 15 S. C. R. 145. There it was not shewn how the fire originated, and if it had been shewn that it broke out shortly after an engine, known as No. 4, had passed, no other cause for the fire being shewn, the jury might properly enough have been asked to draw the inference that sparks from that engine caused the fire, but no trace of fire was seen until after the passing of a second engine upwards of an hour subsequently in an exceptionally dry season, and it was discovered some ten

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BURTON, J.A.

minutes after the passing of that second engine, and it being common knowledge that all engines do emit sparks which might have caused the injury, the presumption would rather be that the fire was caused by the second engine, and that there was no case for the jury that it was caused by the other, and that like the case of *Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41, a verdict of the jury must have been mere guess work. But in that case it was held that it could not be withdrawn from the jury, and in the recent case of *Derochie* v. *Cornwall*, 21 A. R. 279; 24 S. C. R. 301, which probably brought about the change in the law, the majority of this Court were of opinion that there was evidence for the jury and the judgment was affirmed by the Supreme Court, Gwynne, J., dissenting.

I am unable to distinguish these cases, and many others to which I could refer, from this one.

It was shewn that this very dangerous spot had been covered with ice and snow for a long time before the plaintiff met with the accident; that the defendants fully recognized that it was dangerous whenever snow fell, and made special arrangements to guard against accidents which they failed to carry out on this occasion; that the danger might have been avoided if these precautions had been taken. It may be that the jury might have come to the conclusion that the evidence was not altogether reliable, but, if true, they could scarcely come to any other conclusion than that at which they arrived, and certainly if the cases to which I have referred are to be considered as good law, the learned Chief Justice could not have withdrawn the case from their consideration.

I feel, therefore, that we cannot interfere with the verdict, affirmed as it has been by the Divisional Court, and that the appeal should be dismissed.

OSLER, J. A.:—

The 13th section of the Municipal Amendment Act, 1894, 57 Vict. ch. 50 (O.), adds a proviso to sub-section 1

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OSLER, J.A.

of section 531 of the general Act, by which it is enacted that "no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation;" and notice in writing of the accident is required to be given within the prescribed time, the want or insufficiency of which may be excused under certain circumstances by the trial Judge. The Act of last session has made some material changes in this and other respects with regard to the notice: 59 Vict. ch. 51, sec. 20.

Section 13 has, in my opinion, no application to this case, and, therefore, it is unnecessary to consider the questions so ably argued on the appeal as what is meant by "gross" negligence of the corporation, or whether the learned trial Judge was right in holding that there was a reasonable excuse for this want of notice. I may, however, say, that assuming notice to have been required as the Act formerly stood, in case of all accidents, I have considered the question, and am of opinion that the ruling of the learned Chief Justice at the trial, that there was a reasonable excuse for not giving the notice, ought not to be interfered with.

The accident the unfortunate plaintiff met with did not occur on the sidewalk, but on the street crossing, and was owing to the crossing and not the sidewalk being in a state of disrepair. These are distinct portions of the street and are so recognized in more places than one of the Consolidated Municipal Act, 55 Vict. ch. 42 (O.); as for example in sub-section (3) of section 531; sections 623; 623 (*b*); 496, sub-sections 25, 38; 612, sub-section (1). The sidewalk is, I think, always understood and referred to as meaning the footway or that part of the street on which taxable property fronts or abuts—the footway which the corporation may by by-law require the frontagers to keep clear of snow and ice, and for constructing and maintaining which they may be taxed under the local assessment clauses of the Act. It is not an apt or suitable term to apply to street crossings which are used

Judgment.

OSLER, J.A.

indiscriminately by all classes of passengers. The object of the amendment seems to be to relieve the corporation from the stricter rule of liability in those cases where the accident generally occurs through the negligence of the person whose duty under their by-law it is to keep the walk clear of snow. Whether the Act applies to a walk or footway which is laid along the middle of the street, it is not necessary to decide.

The case presented, therefore, simply is, whether there was any evidence of negligence proper to be submitted to the jury, that the street, at the particular place where the plaintiff met with the accident, was out of repair.

I should have thought it too late for any one to contend in any Provincial Court that a street or road could not be shewn to be out of repair by reason of snow and ice having accumulated thereon in such a way as to render it unsafe and dangerous to travellers, and that persons sustaining injury in consequence of non-repair of that kind could not maintain an action. If that contention is put forward now I must respectfully disagree with it. The law cannot be stated more favourably for the defendants than it is by Gwynne, J., in *Ringland* v. *Toronto*, 23 C. P. 93, a case of this very kind, in the passage I quote from p. 98: "It is obvious that what is 'repair' and 'want of repair' must depend upon various considerations—the nature of the obstruction causing the alleged disrepair, whether it be caused by the elements or by the wrongful act of some individual, the season of the year, the severity and inclemency of the weather at the time, if it be severe and inclement for the season. And with reference to these and such like surrounding circumstances the question must be whether or not the road or sidewalk was in reasonable repair for the use to which it is applied. The question must be always one having relation to what is reasonable, having regard to the surrounding circumstances."

The rule as thus stated contains nothing new or which has not always been acted on as applied to the duty of the

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OSLER, J.A.

corporation to keep their roads generally in repair. The importance of it in the case cited is that it concedes that a corporation may be guilty of actionable negligence when the dangerous condition of the road is owing to the accumulation of snow and ice thereon: *Shea* v. *Lowell*, 8 Allen 136; *City of Providence* v. *Clapp*, 17 Howard 161.

So in *Caswell* v. *St. Mary's, etc., Road Co.*, 28 U. C. R. 247, another similar case, where on the evidence the defendants were held to be liable, the Court say (p. 252): "If snow collects at a spot, and by the thawing and freezing the travel upon it become specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel * * * (p. 254.) It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and if so from what cause, and if from a natural cause or process whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use. If the obstruction or danger could properly and reasonably have been removed, then the persons on whom the burden lay to keep the road in order should be held to the fulfilment of their duty to make it safe and useful for the public, at whatever season of the year or from whatever cause the impediment or difficulty may have happened."

And the Legislature, by the Act already cited, recognize that a street or sidewalk may become in a state of actionable disrepair from the cause which gave rise to the accident in question in this case, and they surround the corporation with certain special protection from accidents arising therefrom as regards sidewalks.

In a case of this kind it must no doubt be conceded that a plaintiff has a more difficult task than in others to prove negligence on the part of the corporation, because from the

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OSLER, J.A.

very nature of the material which causes the alleged want of repair, the condition of the road may change from day to day, and where it is safe to-day it may, owing to sudden changes of temperature or fall of snow or rain, be dangerous to-morrow, or *vice versâ*, so that the condition which causes the danger may be of the most temporary and evanescent description.

This is well put by Wilson, C.J., in *Caswell* v. *St. Mary's, etc., Road Co.*, 28 U. C. R. 247, and by the Chief Justice of this Court in *Derochie* v. *Cornwall*, 21 A. R. 279, in delivering the judgment of the Court in which the *Caswell* case was expressly affirmed.

In *Ringland* v. *Toronto*, 23 C. P. 93, where the plaintiff failed, all that could be found in support of the allegation of negligence was that the small piece of ice on the sidewalk which caused the accident had been there for a day and a night. There was no reasonable evidence of notice to the corporation, and all that is decided in the case is that the mere existence of a piece of ice on a portion of the sidewalk is no evidence of actionable negligence. I think no one will disagree with that. Again in *Burns* v. *City of Toronto*, 42 U. C. R. 560, the plaintiff failed partly on the ground of contributory negligence and partly on the ground that there was no evidence that the defendants could reasonably be held to have had notice of the condition of the sidewalk.

Bleakely v. *Prescott*, 7 O. R. 261, 12 A. R. 637, was tried by a judge without a jury. He held that under the circumstances there was no negligence on the part of the corporation, and his decision was upheld in this Court on the ground that there was no proof of such accumulation of snow as indicated negligence on the part of the corporation, and there being no evidence of negligence in the construction of the sidewalk the defendants were not liable.

Where there is evidence of a structural defect in the sidewalk or road, in consequence of which the snow and ice which cause the accident accumulate, liability is, no doubt, more easily inferred. That is the ground on which

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the decision of the Supreme Court in *Derochie* v. *Cornwall* was based, 24 S. C. R. 301; but I do not understand that to be a *sine quâ non* of the liability of the corporation, and Taschereau, J., expressly agrees with the ground of the decision in this Court which was not based on the existence of any structural defect, and there was none such in *Caswell* v. *St. Mary's, etc., Road Co.*, 28 U. C. R. 247.

Then, as was argued in the *Derochie* case in the Supreme Court, and as has often been argued both in this Court and the High Court, it is said that unless the corporation could be indicted for a nuisance they are not liable to an action. This argument is based upon the language of the section 531 (1), that in default of the corporation to keep in repair they shall "besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default." The enactment in this form first appears, so far as I know, in the Municipal Act of 1873, 36 Vict. ch. 48, sec. 409. In the earlier Acts it ran "the default of the corporation, etc., to keep in repair shall be a misdemeanour punishable by fine in the discretion of the Court, and the corporation shall be further civilly responsible," etc. Whatever signification may be attached to this change of expression, I oppose to the argument our own decision, and that of the Supreme Court, in *Derochie* v. *Cornwall*, 21 A. R. 279; 24 S. C. R. 301, and the cases of *Mason* v. *Peterborough* (unreported, but see 20 A. R. 683), in this Court, affirmed in the Supreme Court, and *Toms* v. *Whitby*, 37 U. C. R. 100 as well as the general course of decision in all similar cases in our Courts. In the cases I have mentioned and others, such *e.g.*, as *Boyle* v. *Dundas*, 25 C. P. 420; 27 C. P. 129, the actual condition of disrepair which gave rise to the injury has been in itself of a comparatively trifling nature, but in none has liability been tested by considering, *a priori*, the question whether an indictment would have lain here against the corporation.

The argument in truth is more plausible than sound, for it assumes that an indictment would not lie, and therefore

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that there is no action. We may think that a case is one in which a grand jury would probably not find a bill or a petty jury convict if they did, but given that an injury has been caused by want of repair, so that in fact the condition of the road was dangerous, and measuring the duty of the corporation by the rule laid down in *Ringland* v. *Toronto*, 23 C. P. 93, and by this Court, in *e.g.*, *Lucas* v. *Moore*, 3 A. R. 602, 608, and in numberless other cases, how is it possible to say *a priori* that an indictment could not lie, to be disposed of by the jury as in the case of an action upon the evidence? I do not, of course, mean to be understood as saying that an indictment could not lie until some one had suffered special damage, but only that when that is shewn to have happened in consequence of the negligently dangerous condition of the road it cannot be laid down as a matter of law that an indictment would not have lain. It may be conceded in short without advancing in any way the argument for the defendants, that their liability to an action, and their liability to any other punishment provided by law are correlative, since that liability, in whatever shape it is sought to be enforced, arises, as Patterson, J. A., puts it in *Lucas* v. *Moore*, "not merely because the road is impassable or dangerous, for that state of things may exist without blame to the corporation, but because there has been neglect of the duty to keep the road in such a state of repair as is reasonably safe and sufficient for the ordinary travel of the locality."

The only question, therefore, as I have said before, is whether there was evidence of such neglect proper to be submitted to the jury.

The defendants are no backwoods township or small straggling village, but an ancient, busy, and populous city, and the place where the accident happened was on the crossing of two of its principal and most frequented streets —Princess and Montreal—on one of the most important thoroughfares. The condition of this crossing where it joined the sidewalk in the direction in which the plaintiff was going is thus described in the evidence. The dip to

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the sidewalk was, by reason of the ice and snow which had accumulated on it, considerably more abrupt than the natural inclination of the crossing—a dip of 30 or 40 degrees in three feet—very slippery—a kind of deep incline where the crossing joined the pavement—came down very sharp for probably two feet back—approach very sudden—came down very sudden on a jog of 40°—quite a drop from the snow to the edge of the sidewalk—it was dangerous—almost impossible to go down it with safety—a very bad crossing—many people had been seen to slip there, and two or three to fall—had been more or less, all the winter, in a slippery and dangerous condition—in the condition in which it was when the plaintiff fell for two weeks at least. There were three aldermen for the ward in which the crossing was, and the mayor lived "up that way." That the defendants recognized what ought to be done in respect of such a crossing, there is the evidence of the city engineer, who said that every time he saw it, it was in good condition—if not would send men to make it so. Kept men cleaning snow off these crossings—maintained a general supervision over the streets, and there was also a foreman, was often up and down Princess street in the winter. Often went to look up and down it in icy weather to see if anything could be done—frequently got ashes and sand sprinkled on the whole surface of Princess street, and especially on the crossings; kept barrels of sand in the tool house for the purpose, and would send men to get ashes from the stores. One of the plaintiff's witnesses said that ashes had been put on the street once during the winter.

It appears to me, as it did to the learned Chief Justice who tried the case, that it was impossible to withdraw evidence of this kind from the jury, and that if they believed the plaintiff's witnesses they were justified in finding that the place in question was dangerous and that there had been a clear neglect of the very duty the defendants themselves thought they owed to the public in respect of such a crossing. The case went to the jury

with a direction very favourable to the defendants on the question of negligence, and dealing with the whole of the evidence, they found a verdict for the plaintiff, which the Common Pleas Division have upheld. I feel no doubt that we ought not to interfere with the judgment, and therefore in my opinion the appeal should be dismissed.

Judgment.

OSLER, J.A.

MACLENNAN, J. A. :—

I think that, for the reasons given by the learned Chief Justice, this appeal should be allowed.

Appeal dismissed, the members of the Court being divided in opinion.

SHAVER v. COTTON.

Company—Winding-up—Action against Shareholder by Creditor of Company—R. S. C. ch. 129—R. S. O. ch. 157, sec. 61.

After a winding-up order has been made under R. S. C. ch. 129, a judgment creditor of the company cannot bring an action under section 61 of R. S. O. ch. 157 against a contributory, for payment of the amount unpaid on his shares.

Judgment of the Queen's Bench Division, 27 O. R. 131, reversed.

Statement. THIS was an appeal by the defendant from the judgment of the Queen's Bench Division, reported 27 O. R. 131.

The plaintiff was a judgment creditor of the Tribune Printing Company, a company duly incorporated under the Ontario Joint Stock Company's Letters Patent Act, R S. O. ch. 157, and on the 3rd of April, 1894, on his application, an order was made under the Dominion Winding-up Act, R. S. C. ch. 129, declaring the company insolvent, directing that it should be wound up, and referring the matter to the Master in Ordinary, and on a subsequent application by the plaintiff a liquidator was appointed. No further step was taken in the winding-up proceedings, and on the 13th of June this action was commenced against the defendant as an alleged contributory asking payment of the amount due on his stock, in accordance with the provisions of section 61 of the Ontario Joint Stock Company's Letters Patent Act, R. S. O. ch. 157. The defendant pleaded the winding-up order as a bar to the action and afterwards, shortly before the trial, moved to stay proceedings, and there was a dispute as to the terms of the order made on the motion, which it is, however, unnecessary to refer to further.

The action was tried at Toronto on the 13th of April, 1895, before MEREDITH, J., who gave leave to the plaintiff to add the liquidator of the company as a co-plaintiff within one week, and in the event of that being done directed that judgment should be entered for the plaintiffs against the defendant for the amount in question with interest and costs, the amount recovered to be applied by

the liquidator as assets of the company in the winding-up proceedings, and on the 14th of May, 1895, the liquidator not having been added as a co-plaintiff, a supplementary judgment was given by the learned Judge dismissing the action without costs and without prejudice to any proceedings under the Winding-up Act. Statement.

Upon motion by the plaintiff to the Queen's Bench Division judgment was entered in his favour for the full amount unpaid on the stock, with costs.

The defendant appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 24th and 25th of March, 1896.

W. E. Raney, for the appellant. There is a direct provision in the Imperial Act that after a winding-up order has been made an action of this kind cannot be commenced, and while there is no provision to that effect in our Act the same intention is to be gathered from the statutory provisions vesting all assets and rights of action in the liquidator, and making it his duty and his right to collect the amount due by the contributories. [He was stopped by the Court.]

F. E. Titus, for the respondent. The right here contended for is given in express terms by section 61 of R. S. O. ch. 157, and that right cannot be inferentially restricted by the mere general provisions as to the liquidator's duties and rights. Shareholders in companies registered under the English Companies Act are liable only to the company, and there is no provision there for recovery by a creditor. An unregistered company under the English law stands, however, on a different footing, the shareholders being directly liable to creditors, and section 198 of the English Companies Act, 1862, makes special provision for staying a creditor's action against a shareholder in an unregistered company after a winding-up order has been made. In *Rudow* v. *Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600, it was held that without this

Argument. express statutory power the Court would have had no jurisdiction to stay such an action. There being, therefore, no such statutory provision here, that decision shews that the right to stay does not exist, and indeed section 90 of our Act preserves the creditor's right of action. At any rate it does not lie in the defendant's mouth to take the objection, and if there is anything in the point the liquidator should be added and the benefit of the proceedings preserved.

W. E. Raney in reply. The liquidator's right is different from the right attempted to be enforced here by the plaintiff. The liquidator can only recover upon shewing that calls have been made and notice of the calls given: *In re Haggert Bros. Manufacturing Co.*, 19 A. R. 582; *Ontario Investment Association* v. *Sippi*, 20 O. R. 440. The liquidator must also bring in all the contributories and recover from each only his proportion of the full amount that it is necessary to raise in order to pay the creditors. Possibly that sum may be much less than the amount unpaid on the stock.

May 12th, 1896. HAGARTY, C. J. O. :—

Section 198, of the Imperial Companies Act of 1862, declares that no suit, action or other legal proceeding shall be commenced or proceeded with against any contributory in respect of any debt of the company except with the leave of the Court on such terms as the Court may impose.

The preceding section allows the Court to restrain proceedings against a contributory after petition and before order.

With every respect to the Divisional Court, I must express my opinion that I consider the plea of the defendant as to the winding-up order a complete legal bar to the plaintiff's recovery, and to allow this plaintiff after the company was in process of liquidation to recover the unpaid stock seems to me to be a subversal of the main principle of the Act.

Judgment.

HAGARTY, C.J.O.

All the unpaid stock was undoubtedly the assets of the company for realization and distribution among the creditors, including this plaintiff.

After a winding-up order, by section 15 of R. S. C. ch. 129, every alteration in the status of the members of the company shall be void.

The defendant's unpaid stock was an asset of the company, and by section 44 every shareholder is liable to contribute the amount unpaid on his shares and the amount he is liable to contribute shall be deemed an asset of the company and a debt due to the company.

The remedy by proceedings in the nature of *sci. fa.* by a judgment creditor of a company against a stockholder has been considered as a kind of extended execution against the assets of the company: see per Willes, J., *Lee* v. *Bude and Torrington Junction R. W. Co.*, L. R. 6 C. P. 576, and bringing an action against the contributory after a winding-up order is made seems certainly an attempt to seize for a creditor's benefit what the law declares to be an asset or property of the company. Section 17 declares that every attachment, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. The creditor here must come in with the other creditors and receive whatever may be coming to him on a fair division of all available assets.

We are not concerned here with any question as to the power of a court or judge to stay proceedings.

My judgment is based on the defence of the defendant under the plea as to the winding-up proceedings. The plea shews that he has no right or claim whatever in the action he has brought, that the defendant's liability on the unpaid stock has passed wholly beyond the reach of his statutable liability to creditors, and is now wholly an asset of the company for division amongst its general creditors.

I think the judgment of the trial Judge must be restored, and the action dismissed with costs, and this appeal be allowed.

Judgment.

BURTON, J.A.

BURTON, J. A. :—

The only doubt I have felt in this case is as to whether the proper proceedings were taken to bring the matter before the Court. I cannot say I have any doubt that if an application had been promptly made to stay proceedings in this action on the ground that the company was being wound up, the Court, under its general jurisdiction, must have granted the application.

I incline strongly to the view that the omission from our Act of a provision similar to section 198 of the English Companies Act of 1862 does not assist the plaintiff. A reference to the clauses of the Winding-up Act under the heading "Proceedings after the Winding-Up Order is made" and "Contributories," shews, I think, very conclusively that an action of this kind cannot be proceeded with by a creditor for his individual benefit after the commencement of the winding-up, but that the enforcement of the liability of the shareholders or other contributories is from that time in the hands of the liquidator.

It would be rather a reflection upon the framers of that enactment were it otherwise, it being the obvious intention of the Legislature that all the assets of the company, of which this is one, should be ratably distributed among the creditors.

My brother Osler has collected a great number of sections of the Act, all tending to shew that no privilege or lien can be created or obtained after the winding-up commences in favour of any particular creditor, and all inconsistent with the view that this action is maintainable.

Whatever question, however, might have existed as to the power of the defendant to raise the question by plea is, I think, removed by the Judicature Act, 58 Vict. ch. 12, sec. 52, sub-sec. 9 (O.), which provides that every matter of equity on which an injunction might have been obtained prior to the Judicature Act may be relied on by way of defence to the action.

I am of opinion, therefore, that the appeal should be allowed and the action dismissed.

Judgment.

BURTON, J.A.

But there is a point of which no notice seems to have been taken which would apparently have been fatal to the plaintiff's recovery in this action.

In cases under the Act authorizing a proceeding by *sci. fa.* creditors were not entitled to proceed against an individual shareholder until all remedies against the assets of the company were exhausted. This was generally done by shewing a return of *nulla bona* to a *fi. fa.*, but that is by no means conclusive, for it is consistent with such a return that it may have been made at the request of the plaintiff and without any *bonâ fide* effort to look for property.

On the 2nd of April, 1894, a writ of execution was issued upon the plaintiff's judgment against the goods of the company. On the following day an order for winding-up the company was made on the application of the plaintiff, and the return of *nulla bona* was made by the sheriff on the 30th of May.

It may be that the company had no goods which were exigible under execution at the time the writ was placed in the sheriff's hands, but if there were any the sheriff was prevented seizing and selling them by the plaintiff himself.

It would seem, therefore, that the plaintiff had disabled himself from proceeding under the Act.

The joinder of the liquidator would have been a futile proceeding even if permitted ; the measure of the recovery by a creditor for his own benefit and that of the liquidator might be altogether different, as the calls of the liquidator would be regulated by the amount required to meet the claims of the company, having regard to the other assets available for the purpose.

OSLER, J. A. :—

The effect of the successful prosecution of an action of this kind is that the creditor obtains satisfaction of his judgment out of the company's assets, because what he recovers from the shareholder is a discharge *pro tanto* of

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OSLER, J.A.

the amount remaining unpaid on his shares. The provisions of the Winding-up Act must be singularly defective if this can be done with impunity after the company has been placed in liquidation. Against the company itself no action or other proceeding can be commenced or proceeded with after the winding-up order has been made without leave of the Court: section 16. Every attachment, distress, sequestration or execution put in force against its estate or effects after that period is void: section 17. And section 66 enacts that no lien or privilege shall be created for the amount of any judgment debt on the real or personal property of the company by the delivery of a writ of execution or the seizure under the writ of the estate or effects of the company, and that no lien, claim or privilege shall be created upon such property or upon any debts due or accruing or becoming due to the company by the issue or making of any attachment or garnishee order or other process or proceeding, if, before the payment over to the plaintiff of the moneys collected under such writ or proceeding, the winding-up of the business of the company has commenced, which by section 7 is declared to be the time of the service of notice of the presentation of the petition for the winding-up. Yet, notwithstanding these provisions, which so plainly announce the intention of the Legislature that no individual creditor shall obtain any advantage over the rest against the company's assets, it is contended, and has been so decided, that by means of an action like the present, which is really an action in the nature of a *scire facias* or extended execution, he can successfully do so.

I am with all deference clearly of opinion that this decision cannot be upheld. Were there no other sections to be considered than those I have referred to I should be disposed to say that the 17th and 66th sections were opposed to the existence of the right of action asserted. But there are others.

Section 15, sub-section 2, enacts that every alteration in the status of the members of the company after the commencement of the winding-up shall be void.

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OSLER, J.A.

Section 25: If at any time there is no liquidator all the property of the company shall be deemed to be in possession of the Court.

Section 30: The liquidator upon his appointment shall take into his custody or under his control all the property and effects and choses in action to which the company is entitled.

Section 31 (*a*): He is to bring or defend actions in his own name as liquidator or in the name and on behalf of the company.

Section 33: With the approval of the Court he may compromise calls, debts, and liabilities subsisting or supposed to subsist between the company and any contributory or other debtor to the company, and all questions in any way relating to the assets of the company or its winding-up upon such terms as may be agreed upon and may give a complete discharge in respect of calls, etc.

Section 39: He is subject to the summary jurisdiction of the Court in the same manner and to the same extent as are its ordinary officers, and performance of his duties may be compelled, and all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in his hands, possession or custody, may be obtained by summary petition and not by any action or other proceeding of any kind, etc.

Section 42: A list of contributories is to be settled as soon as may be after the commencement of the winding-up. "Contributory," by section 2 (*f*), means a person liable to contribute to the assets of the company under the Act.

Section 44: Every shareholder shall be liable to contribute the amount unpaid on his shares of the capital. The amount which he is liable to contribute shall be deemed an asset of the company and a debt due to the company payable as directed or appointed under this Act.

Section 46: The liability to contribute to the assets creates a debt accruing due from the contributory at the

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OSLER, J.A.

time when his liability commenced, but payable at the time or times when calls are made thereon for enforcing it.

And section 49 enacts that the Court at any time after the making of the winding-up order may make calls on the contributory to the extent of his liability for the purpose of winding-up, as specified.

These sections, it appears to me, conclusively shew that the power of dealing with and collecting the assets of the company after the winding-up order is made is vested in the liquidator alone. The special provisions with regard to the liability of the shareholder, the manner in which it is to be called in and paid, and the power to compromise calls and other debts and claims of the company are totally inconsistent with any right in the creditor to pursue the remedy which he had against the shareholder before the status of the company had been changed by the winding-up order. There was therefore no need for any express prohibition of an action by the creditor to recover for his own benefit part of the company's assets. How can he have an action for that which, by direction of another Legislature having jurisdiction over the assets of the company in its altered condition, is to be collected and recovered by the liquidator for the benefit of the general body of the creditors? It is said that the right of the liquidator is no more than that which the company itself had before the winding-up order, when the execution creditor might also have sued the shareholder. But the fact that the right has been taken from the company and conferred upon the liquidator makes all the difference. The company has really been placed in insolvency. The right of the liquidator is inconsistent with that of the execution creditor, and that the right of the latter should continue after the winding-up order is simply inconsistent with the whole scheme of the Act.

In the judgment below some stress is laid upon the absence in our Act of any section corresponding with section 198 of the English Companies Act of 1862, which prohibits any action against a contributory after the making of the

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OSLER, J.A.

winding-up order without leave. That section, however, relates to a special class of companies, *inter alia* companies in existence before the Act was passed, but registered in pursuance of Part VII. of the Act: *Re South of France Pottery Works Syndicate*, 37 L. T. N. S. 260; *Rudow* v. *Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600; Lindley on Companies, 277, 676, 682, 683. As regards other companies formed and registered under the Act, no such provision was necessary, and therefore none is to be found, any more than in our own Act, which, when the status of the company to which it applies has been changed by the winding-up order, in other words, by being placed in insolvency, necessarily supersedes those of its Act of incorporation so far as they relate to the administration of the assets. In this connection, moreover, there is a striking difference between the position of a creditor under our Act and under the English Act, viz., that the latter contains no section corresponding to section 66 of ours (no lien created by execution, etc.), so that notwithstanding section 163 (which corresponds to section 17 of our Act already cited) the Courts hold that they have a discretion, exercised, no doubt, with great caution and reluctance, to give leave to a creditor to enforce an execution or to make it a first charge on the assets in the hands of the liquidator, treating section 163 as qualified by or subject to section 87 (the same as our section 16): Emden's Winding-up Practice, 5th ed., p. 65; *In re United English and Scottish Life Insurance Co.*, L. R. 5 Eq. 300; *In re Dunison's Estate Fire Clay Co.*, L. R. 19 Eq. 202; *In re Taylor*, 8 Ch. D. 183; *In re Williams*, 8 Ch. D. 192; *In re Universal Disinfector Co.*, L. R. 20 Eq. 162; *In re Vron Colliery Co.*, 20 Ch. D. 442; *In re Lancashire Cotton Spinning Co.*, 35 Ch. D. 656; *In re Dry Docks Corporation of London*, 39 Ch. D. 306.

Section 66 is entirely opposed to the existence of any such discretion under our Act, and the other sections I have referred to, notably sections 30, 33, 39 and 44, shew how completely the assets are placed beyond the reach of the

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OSLER, J. A.

individual creditor. And even if it be thought that the defendant's right to defend himself against such an action as this is not so much by way of shewing that no such action under the circumstances can be brought, but a right to the equitable interposition of the Court to prevent a recovery and abstraction of the assets by the individual creditor, yet section 52, sub-section 9, of the Judicature Act, 1895, 58 Vict. ch. 12 (O.) shews that such matter of equity may be pleaded and that the party is not necessarily driven to move for a stay of proceedings.

With regard to adding the liquidator as a plaintiff and so maintaining the action at his suit, which was permitted to be done by Meredith, J., at the trial, it is only necessary to add that no such relief can or ought to be granted, as the liquidator's right of action against the contributory depends upon his having been placed upon the list and upon the necessary proceedings having been taken to make a call upon his shares due and payable.

The appeal must be allowed and the action dismissed.

MACLENNAN, J. A.:—

With great respect I think this appeal should be allowed. The question is whether a winding-up order is a defence to an action by a creditor of a company under section 61 of the Ontario Joint Stock Companies Letters Patent Act against a shareholder who has not paid up his stock in full. The action was brought against the shareholder after the making of a winding-up order and the appointment of a liquidator under the Dominion Winding-up Act, R. S. C. ch. 129, and I think the winding-up order is a defence.

The judgment of the Divisional Court proceeds upon the absence from the Winding-up Act of any section corresponding to section 198 of the English Companies Act prohibiting actions against contributories after an order is made for winding-up, and the absence of any provision which can be properly construed as creating such a prohibition. With great respect, I think the bringing of such an action is contrary to the whole scope and intent

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MACLENNAN, J.A.

of the Winding-up Act. Unpaid stock is an asset of the company, and the moment a winding-up order is made that unpaid stock has, in effect, been appropriated for ratable distribution among the creditors of the company. The order is, in effect, a judgment of a competent Court making such an appropriation, and it is binding on the company and also upon all the creditors and shareholders, and the object of the present action is to have the unpaid stock paid and applied contrary to the terms of that judgment. The winding-up order requires that the stock shall be applied to the payment of all creditors without preference or priority, while the action seeks to have it paid exclusively to the plaintiff. There are many sections of the Winding-up Act which, in my judgment, shew clearly that the action cannot be maintained. Section 17 declares that "Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void." The present action is in the nature of a proceeding to have execution against the company's assets, that is, the unpaid stock, and I think the creditor who has recovered judgment against the company has no more right to issue a *sci. fa.* against a shareholder than to issue an execution against the company's goods. Section 30 requires the liquidator to take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled; section 39 forbids any action, suit, attachment, seizure, or other proceeding of any kind whatever for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, other than by an order of the Court on summary petition; sections 42, 43, 44, and subsequent sections, shew how the unpaid stock of the shareholders is to be recovered and applied under the winding-up; and the concluding part of section 44 is express that the unpaid stock is to be deemed an asset of the company, and a debt due to the company, and payable

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MACLENNAN, J.A.

as directed or appointed under the Act. And again, section 66 in effect prevents the enforcement of any judgment against the company's assets by any execution, levy, or seizure, garnishee order, or other process or proceeding if before payment over to the plaintiff of the money the winding-up has commenced, with the single exception of any lien or privilege for costs.

I think all these sections of the Act leave no room for the contention that the present action could properly be commenced or proceeded with against the defendant as a shareholder of the company. The respondent, however, relied upon section 90 of the Act, which declares that the powers conferred by the Act on the Court are in addition to and not in restriction of any other powers subsisting either at law or in equity of instituting proceedings against a contributory or the estate of any contributory for the recovery of any call or other sums due from him or his estate, and such proceedings may be instituted accordingly. I do not think this section at all assists the respondent or supports the judgment. It is evident that this section has no reference to any action or proceeding by or on behalf of a creditor, but to actions or proceedings in furtherance of the winding-up. It would probably apply, for example, to the case of a deceased contributory or debtor of the company whose estate was not sufficient to pay all creditors in full. In such a case it might be necessary for the liquidator, either in his own name or in the name of the company, to obtain a judgment or order for the administration of the estate of the deceased person instead of endeavouring to recover the debt, or a ratable share of it, by summary order, as in other cases.

I ought to add that, in my opinion, the absence of any provision similar to section 198 of the Companies Act in England can have no effect in qualifying the operation of the sections of our own Act to which I have referred.

I am therefore of opinion that the appeal should be allowed, and that the action should be dismissed with costs.

Appeal allowed.

DAVIDSON V. FRASER.

Bankruptcy and Insolvency—Assignments and Preferences—Payment of Money to Creditor—R. S. O. ch. 124, sec. 3.

Endorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of section 3 of R. S. O. ch. 124.

Armstrong v. *Hemstreet*, 22 O. R. 336, overruled.

Judgment of the Common Pleas Division reversed, OSLER, J.A., dissenting.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Division.

The plaintiffs, who were simple contract creditors of the defendant W. A. Fraser, brought the action on behalf of themselves and all his other creditors to set aside three conveyances of land made by him to his wife, and to have her declared trustee for him of certain insurance moneys on his stock-in-trade received by her. It is unnecessary to set out the facts in detail as to the conveyances, as the Court came to the conclusion, on the evidence, that Fraser was solvent when the conveyances were made. The fire occurred in July, 1892. He was insolvent at the time, and his wife had a claim against him for moneys advanced. He received in Sarnia from the insurance company in Montreal two unaccepted cheques drawn on banks in Montreal, payable to his order, for $1,636, the amount of the loss, and endorsed these cheques in blank and either handed them to his wife, or to mortgagees of her land, the amount being applied in reduction of the mortgage debt.

The action was tried at Toronto, on the 18th of September, 1895, before MEREDITH, J., who gave judgment in favour of the plaintiffs in respect of one conveyance and in other respects dismissed the action.

Both parties appealed to the Common Pleas Division and the defendants' appeal was allowed, the action being dismissed.

Argument. The plaintiffs then appealed to this Court, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 16th and 17th of March, 1896.

G. G. Mills, for the appellants. (After dealing with the evidence as to the conveyances.) The transfer of the cheques to the wife is not a payment of money and cannot be upheld. *Armstrong* v. *Hemstreet*, 22 O. R. 336, is wrongly decided, but at any rate it does not decide that handing over a cheque of a third person is a payment of money. There the cheque was transferred in the ordinary course of business, and the cheques here were drawn on banks in another Province. A cheque is not money but an order for the payment of money, and this is a preferential transfer of securities for money, and the plaintiffs are entitled to relief: *Masuret* v. *Stewart*, 22 O. R. 290; *Jackson* v. *Bowman*, 14 Gr. 156.

Watson, Q.C., for the respondents.

May 12th, 1896. HAGARTY, C. J. O.:—

As far as I can gather from the meagre and rather uncertain statements in the evidence, the insurance company in Montreal drew these cheques on their Montreal banks to Fraser's (the insured) order, and sent them to him at Sarnia soon after the fire; that he indorsed them to his wife and she took them to the Lambton Loan Company and handed them in there to be applied for or on account of her mortgage to them. She became her husband's creditor by raising money to help him on the security of property which she had acquired from him some time before when he was in good circumstances and in a position to make a voluntary conveyance.

It appears that the cheques were ultimately duly paid to the legal holders thereof, whoever they may have been.

The question is, whether this was a case under the statute of "a payment of money to a creditor" by the insolvent.

I feel great difficulty in adopting the view of the Court

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below in favour of holding that it is. The Divisional Court adopted the judgment of the Queen's Bench Division in the case of *Armstrong* v. *Hemstreet*, 22 O. R. 336.

The facts there differ from those before us, as expressed in the head note: "The handing by a debtor to his creditor of the cheque of a third person on a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is 'a payment of money to a creditor' within the Act."

The underwriters' cheques on the bank in Montreal, were indorsed by the debtor to his creditor and wife. She gets them accepted by the loan company as so much paid on her mortgage held by them. It is clear that if the debtor had merely the note of the underwriters on demand, he could not transfer that to his creditor; or if he received their authority to draw on them at sight or otherwise for the insurance money, I do not think he could indorse the draft (payable to his order) to the creditor and call it a payment of money under the statute. Even his cheque drawn on the underwriters' bank by arrangement with them for the amount of insurance moneys in favour of the creditor, though ultimately paid by the then holder in Montreal, would be at law a bill of exchange as declared by section 72 of the Bills of Exchange Act of 1890, declaratory of the law.

Section 53 also declares the law to be that a bill of itself does not operate as an assignment of funds in the hands of the drawee.

Our Act avoids all transfers by an insolvent of bills, bonds, notes, securities, etc. The word "cheque" is not mentioned. Nor in the exempting clause is any wider meaning given to the words "any payment of money to a creditor" than there tersely expressed.

It would seem to me to be more consistent with a proper interpretation of the Act to avoid preferential dealings by an insolvent to hold that cheques such as those in the present case fell under the word "bills or other securi-

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HAGARTY, C.J.O.

ties for money," than to widen the protection under the words "payment of money."

I think we must take the word "money" in its ordinary sense. There are many authorities as to its construction in wills where it is generally strictly confined to its primary meaning: see Theobald's Law of Wills, 4th ed., p. 158 *et seq.*, though capable of expansion by the other terms or dispositions of the will.

Here it appears to me used by the Legislature in a limited sense. What this insolvent handed over to his creditor was certainly not money in any meaning of the word —nothing used to represent cash, or as a current substitute for cash or money so called; and I think we may feel well satisfied that the framers of an Act levelled against preferences could not have intended to protect the transaction before us as a payment of money.

It does not weigh with me that the debtor might have possibly brought the case nearer the literal words of the Act by discounting these Montreal cheques with a banker, and then handing the cash proceeds to his wife. It is sufficient to say that such a course was not taken.

BURTON, J.A.:—

I came to the conclusion upon the argument that the judgment of the Divisional Court ought not to be interfered with except as to the transfer of the cheques received by Fraser from the insurance company, to his wife, which I thought required further consideration.

I have given the whole matter further consideration since the argument, and am still of the same opinion, but upon the question of the cheques I have come to the conclusion that they were in Fraser's hands securities for money which would have been exigible under execution, and would have passed under an assignment to the assignee, and a transfer of which, under the circumstances in evidence here, was void as against creditors.

I think it would be far too narrow a construction of the

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BURTON, J.A.

Act to hold that a payment to a creditor by the insolvent's own cheque would not be a payment in money within the meaning of the statute, nor do I think it necessary to the validity of such a payment that the creditor should have drawn the money from the bank; it operated there and then as a payment, a conditional payment, it is true—that is to say the original debt would have revived in the event of the dishonour of the cheque—but it was, subject to that contingency, a payment as full as if the insolvent had drawn the money and paid it to the creditor.

But I think with great submission that there is a marked distinction between such a case and a transfer of a cheque of a third party, which, in the hands of the insolvent, was a security as fully as a bill at three days or three months and would have been liable to seizure under execution, and an assignment of such a security to a creditor, if made with either of the intents mentioned in the statute, is fraudulent and void against the insolvent's creditors.

The learned trial Judge has found that the transfer was made with the design on the part of both to give to her a preference, but thinking himself bound by the case of *Armstrong* v. *Hemstreet*, 22 O. R. 336, which treated such a transaction as a payment in money, he held that it fell within the exception in sub-section 3, but if such a transfer does not fall within the exception it was a preference, and I think the plaintiffs are entitled to a declaration to that effect, and the judgment should be varied to that extent.

OSLER, J. A.:—

I was satisfied at the conclusion of the argument that the appeal failed as to all the transactions attacked, except the disposition of the insurance money. As to that, it seemed to me there was room for doubt whether the handing over by the debtor to his creditor of the cheques received by him from the insurance company in settlement of his loss could be considered a "payment of money" to

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OSLER, J.A.

a creditor, within the meaning of section 3 of the Assignments Act. I cannot quarrel with the finding of the trial Judge, concurred in by the Divisional Court, that the wife was the husband's creditor. She raised money by means of a mortgage upon her own property, and lent it to him, and she was plainly his creditor for the moneys so lent. The cheques received by the husband from the insurance company were handed by him to his wife, and she disposed of them by transferring them to the loan company on account of her mortgage. That, I think, is the fair result of the evidence, in spite of some confusion as to who actually handed the cheques to the company, and that is the view which has commended itself to the two Courts which have already passed upon the question. I think we are not justified in disturbing their finding.

It is, I must add, quite irrelevant to our decision, how the creditor, the wife, disposed of the cheques, whether by handing them to the loan company as payment on her mortgage, or by getting them cashed at a bank.

Then, whether the transaction was a payment in money. It is impossible on any substantial ground to distinguish the case from *Armstrong* v. *Hemstreet*, 22 O. R. 336, which seems to me to be well decided.

The only difference is that there the creditor was a bank (so called), and the cheques were paid in by the debtor to the credit of his account, thus covering the debt caused by his overdraft, while here the creditor is an individual and the cheques were handed over to her directly.

It has also been remarked that the cheques in that case were drawn upon a bank in the place where the creditors lived—if that was the fact—while here they were payable elsewhere. How that can make any difference in principle it is not easy to see. It is simply another irrelevant fact.

If the statute had meant to include cheques as a forbidden mode of payment I think it would have said so. A cheque, no doubt, is technically a bill, but I do not think that it is ever so spoken of in the commercial world

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OSLER, J.A.

or among business people. What the Act means, in my opinion, by "bills" in the connection in which that word is found in section 2 are acceptable bills or bills drawn by one merchant, or other person, or bank, upon another, and not a mere cheque upon a banker—the usual and common mode of paying money in any but very small transactions.

"Money," in the excepting clause we are here concerned with, has, in my opinion, the same meaning that it has in the subsequent clause, "present actual advances of money," and unless we regard it as meaning or including such an instrument as a cheque, by which, in business transactions, money is usually transferred from one person to another, we confine it to coin or Dominion notes, a narrow and unfamiliar meaning, as applied in ordinary business dealings in the payment of a debt or transfer of funds. Had these cheques been followed home, the probability is that no bills or coin were paid over for them, and that they were treated as accountable funds in settling with the bank on which they were drawn.

I think the mode in which the section as originally introduced, 48 Vict. ch. 26, sec. 3, was amended, supports this view of the larger and ordinary business meaning of the term. In that Act it stood thus: "Nor to any payment of money to a creditor *unless an assignment for the general benefit of creditors is made within one month after the payment*," and, sub-section 3, "In case a payment of money is made to a creditor, * * within one month before the execution of an assignment, * * under this Act, the same shall be void as against the assignment, but not as against persons claiming in any other way." The clause italicized and sub-section 3 were repealed by 50 Vict. ch. 19, sub-secs. 2 and 3 (O.), leaving the section as it now stands. I refer to the judgment of Patterson, J.A., in *Clarkson* v. *Ontario Bank*, 15 A. R. pp. 185-187, for a discussion of these clauses: *Gibbons* v. *Wilson*, 17 A. R. 1. It is not necessary to attribute to the word "money" the very extensive meaning which Falconbridge, J., in *Armstrong* v. *Hemstreet*, 22 O. R. 336, shews it to be capable of, because

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OSLER, J.A.

section 2 in terms cuts that down, but without at all infringing upon the intention of the Legislature I think we may properly hold that a payment made in the manner described in the evidence, is a "payment of money" within the meaning of the Act. For these reasons I am of opinion that the judgment in the whole should be affirmed and the appeal dismissed.

MACLENNAN, J.A. (after dealing with the evidence as to the conveyances) :—

The question remains, however, as to the insurance money. The Courts below dismissed that part of the plaintiffs' claim as well as the rest, following *Armstrong* v. *Hemstreet*, 22 O. R. 336. In that case it was held that delivery by the debtor to a creditor of the cheque of a third person upon a bank was a payment of money within the exception in section 3 of the Assignments and Preferences Act, R. S. O. ch. 124, and was therefore not preferential. In the present case the cheques were those of an insurance company delivered to the debtor in payment of a loss by fire upon his stock of goods. The cheques when received by the debtor were delivered to mortgagees in part payment of a mortgage made by the wife about a year previously upon her property to raise $2,000 lent by her to her husband. In their evidence the defendants do not quite agree as to how, or by which of them, the cheques were delivered to the mortgagees ; but they agree that they were in fact so delivered ; and in their joint defence they say :—

"The defendant, W. A. Fraser, paid none of such moneys to his said wife, nor did he hand her any cheque therefor as alleged, but he did pay some moneys to the mortgagees of her lands under the mortgage given thereon to raise funds to assist him in his business, and even what he paid in this way was in fair proportion to what he paid to his other creditors."

At that time the debtor was undoubtedly insolvent, and

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the whole of the insurance money was applied on the mortgage. Now the statute forbids the preferential transfer of goods, chattels, bills, notes and securities, and excepts "any payment of money to a creditor." I am unable to agree that the transfer of these cheques was a payment of money to a creditor within the exception. I think a payment by the debtor's own cheque is a good payment of money. The money in the bank is his money. If the cheque is paid, it is a payment of the debtor's money. If it is not paid the creditor is just where he was before. The estate of the debtor is not diminished. But the cheque of a third person is a different thing. It is a chattel, it is a bill, it is a security, the property of the debtor. If it is not paid it is a debt due to the payee from the drawer, it is a chattel, a bill, a security, of the payee.

Therefore, I think a transfer of the cheque of a third person is not a payment of money. It is a transfer of a security, which does not become payment until presented and honoured by the bank. The money in the bank in that case, and until the time of payment, is not the debtor's money, and never becomes his if he transfers the cheque.

No doubt cheques of persons in good credit are accepted and transferred with great freedom, particularly after having been marked good by the banker, and are virtually treated as actual money; but the question is whether the cheques in question were money within the meaning of the Act, and I do not think they were. I think, therefore, the transfer of these cheques to the mortgagees of the wife, even although it may have been with her knowledge and consent, was a transfer forbidden by the Act, and void against the husband's creditors. But the cheques have been paid, and the further question is whether the proceeds can be followed, and, if so, how. I think the application of the cheques towards payment of a mortgage on the wife's land is within the principle of *Jackson* v. *Bowman*, 14 Gr. 156. In that case a debtor laid out money

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when insolvent in buildings and improvements on land belonging to his wife, and it was held that the creditor was entitled to a charge on the wife's land to the extent of the expenditure. I see no difference in principle between expenditure in buildings and expenditure in or towards paying off a mortgage, and the plaintiffs are, therefore, in my opinion, entitled to a charge upon the lands of the wife in the present case to the extent to which it was relieved from the mortgage by the insurance cheques. If these cheques had been handed to the wife, and had been cashed by her, it is doubtful whether the proceeds could be followed in the present action, inasmuch as section 8 of the Act, R. S. O. ch. 124, seems only to enable that to be done in an action by an assignee, as authorized by section 7, the present action being an action by creditors.

I am, therefore, of opinion that the appeal ought to be allowed, so far as it relates to the insurance cheques, and that the plaintiffs are entitled to a charge to that extent upon the wife's interest in the lands comprised in the mortgage in question.

Appeal allowed in part, OSLER, J.A., *dissenting*.

PRITTIE V. CONNECTICUT FIRE INSURANCE COMPANY.

Chose in Action—Collateral Security—Action by Assignor—Insurance—Fire Insurance.

Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party.

Where there is separate insurance in different companies in favour of mortgagee and mortgagor, the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between the mortgagee and his insurers although assented to by the mortgagor.

Judgment of the Queen's Bench Division affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division.

The action was brought to recover the sum of $3,000 under an interim insurance receipt, dated the 11th of April, 1894, by which the defendants agreed to indemnify the plaintiff against loss or damage by fire to that amount for thirty-six months on a house described in the receipt. No policy was issued and the fire took place on the 14th of May, 1894. The plaintiff furnished proofs of loss shewing an estimated loss of $17,000. At the time the interim insurance receipt was issued the house in question and other property were subject to two mortgages made by the plaintiff and her husband for $25,000, and at the time of the fire foreclosure proceedings were pending upon these mortgages, and a final order for foreclosure was made on the 11th of June, 1894. On the 14th of May, 1894, the following writing was signed by the plaintiff:—

"Toronto, 14th May, 1894. I hereby assign my right, title and interest in insurance money coming to me from the Connecticut Fire Insurance Company for loss by fire this day to W. J. McMurtry, in consideration of money advanced by him to me."

On the 4th of January, 1895, the following document was executed by the plaintiff and McMurtry:—

"For value received and in consideration of one dollar, I, W. J. McMurtry, of the city of Toronto, in the county

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of York, Insurance Manager, hereby assign, transfer and set over to and unto R. Walker & Sons, Toronto, all my right, title and interest in and to the proceeds of insurance for $3,000 in Connecticut Fire Insurance Company of Hartford on the dwelling house 409 Dovercourt Road, and in and to the proceeds, by settlement or otherwise, of any suit, proceeding, or action at law which may be instituted to recover the said insurance moneys or any part thereof.

And I, Jane Prittie, of Toronto, for value received, hereby consent to the said assignment, and confirm the same, and agree that the said R. Walker & Sons shall be entitled to receive and be paid the proceeds of said insurance which may be paid by or recovered from said company by suit or otherwise."

R. Walker & Sons had recovered judgment against the plaintiff in October, 1894, for $219.83 debt, and $11.72 costs, and this assignment to them was made by way of collateral security for payment of the judgment, and they admitted that the plaintiff was entitled to all the residue of the insurance after satisfaction of the judgment, the following memorandum being annexed to the last mentioned assignment :—

"TORONTO, January 3rd, 1895.

"Mrs. Jane Prittie, Dovercourt Road, Toronto.

"Dear Madam,—In consideration of your assignment to us of the proceeds of your insurance in the Connecticut Fire Insurance Company of Hartford, we agree not to make or accept any offer of settlement without your concurrence; and further agree to hand over to you or to your legal representatives all moneys received by us over and above the amount of our claim against you and the proper costs of Mr. Ryckman for legal services.

"Yours truly,

"R. WALKER & SONS."

The mortgages made by the plaintiff and her husband contained a covenant to insure the buildings on the lands in question to the amount of not less than $9,000. No

Statement.

insurance other than that in question in this action was effected by the mortgagors and the mortgagees insured the buildings in their own name in the North British and Mercantile Insurance Company for $15,000 and charged the premium to the mortgagors. After the fire there was a great deal of correspondence between the solicitors for the mortgagees and the solicitors for the plaintiff, and the solicitors for the company with whom the mortgagees had effected insurance, and in the end the mortgagees, with the plaintiff's concurrence, accepted $6,000 in settlement of their claim.

The action was commenced on the 5th of January, 1895, and the defence was based mainly on the grounds, (1) that the mortgagees had with the consent of the plaintiff accepted $6,000 as the full amount of the loss; (2) that at the time the action was brought the plaintiff's interest had been foreclosed; (3) that the action should have been brought by the assignees of the claim or that they should have been joined as plaintiffs. At the trial at Toronto on the 13th of May, 1895, before MEREDITH, J., and a jury, these defences were given effect to and the case was withdrawn from the jury and dismissed with costs.

Upon motion to the Queen's Bench Division, this judgment was reversed and a new trial was ordered.

The defendants appealed and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 11th of March, 1896.

Watson, Q.C., and *J. G. Smith*, for the appellants. There being only one property and one loss, and full indemnity having been made in respect of that loss, no further claim can now be maintained. At any rate the plaintiff having assigned all her right and interest in the claim before action cannot maintain the action, not, at all events, without joining the assignees as co-plaintiffs.

E. B. Ryckman, and *A. T. Kirkpatrick*, for the respondent. The insurance effected with the defendants was an

Argument

insurance of the interest of the plaintiff. The mortgagees had a right to insure for their own protection, and the settlement with them binds them alone and not the plaintiff. The amount of loss was far more than the amount received by the mortgagees and the plaintiff should have been allowed to establish this fact at the trial. The assignment to R. Walker & Sons was given as collateral security for a debt and that assignment does not prevent the plaintiff from enforcing her claim against the defendants.

Watson, Q.C., in reply.

May 12th, 1896. OSLER, J.A.:—

I think the judgment of the Divisional Court granting a new trial was right. The trial Judge stopped the case too soon.

The plaintiff sues on an insurance contract, within the meaning of the Insurance Act, made with her by the defendants, on which an action is maintainable though no policy had issued at the time of the loss. It is contended by the defendants that she cannot sue because the contract was assigned by her to one McMurtry, who afterwards assigned it to one Walker, by whom alone it is said that the action should have been brought, or, at the least, that he should have been joined as co-plaintiff. This objection, in my opinion, fails. The difference between the English enactment and our own relating to the assignment of choses in action has more than once been pointed out. By the former, 36-37 Vict. ch. 66, sec. 25, sub-sec. 6, any absolute assignment in writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, passes the legal right thereto to the assignee, and the legal and other remedies for the same, and the power to give a good discharge therefor without the concurrence of the assignor.

In *Tancred* v. *Delagoa Bay R. W. Co.*, 23 Q. B. D. 239, a mortgage in the ordinary form of debts due to the mort-

gagor not purporting to be by way of charge only was held to be an absolute assignment within the Act.

By our Act R. S. O. ch. 122, sub-secs. 6 and 7, "assignee" includes any one becoming entitled by an assignment in writing to any debt or chose in action arising out of contract, and possessing, at the time of action brought, the beneficial interest therein and the right to recover, and to give an effectual discharge for the moneys, etc., thereby secured. The assignee shall sue in his own name and for such relief as the original holder or assignor would be entitled to sue for in any Court in the Province.

Under this statute it has, so far as I am aware, been uniformly held that where the assignment of the debt has in fact been by way of mortgage or security only, the assignor retaining a beneficial interest therein, the whole of such beneficial interest, therefore, not passing to the assignee, the assignor, or the assignee in his name, may, notwithstanding the assignment, maintain an action thereon. In such an action I do not doubt that the assignee would be a proper, though, I think, not a necessary party, but he is not a party who, by the Act, is required to sue in his own name. If he has not the whole beneficial interest the assignor is not precluded, more than he was before the Act, from maintaining the action.

I refer to *Hostrawser* v. *Robinson*, 23 C. P. 350, and *Dawson* v. *Graham*, 41 U. C. R. 532. *Wood* v. *McAlpine*, 1 A. R. 234, is a case in which the absence of any beneficial interest in the assignee was proved by parol against the form of the assignment so as to defeat an action brought in his name; as, *converso*, in *Dawson* v. *Graham*, the existence of a beneficial interest in the assignor was proved in the same way in order to support an action by him.

In the recent case of *King* v. *Victoria Insurance Co.*, [1896] A. C. 250, it was held by the Judicial Committee that a claim for damages in tort is assignable under the provisions of the Australian Judicature Act similar to those of the English Judicature Act of 1873. Under

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OSLER, J.A.

our Act an assignment which imposes on the assignee the obligation to sue in his own name seems to be confined to an assignment of a debt or chose in action arising out of contract.

Another objection to the plaintiff's right to recover, yielded to by the trial Judge, was that her mortgagees had obtained from another insurance company, the North British and Mercantile Insurance Company, the full value of the property insured as proved for them for that purpose by the plaintiff. For all, however, that as yet appears these two insurances were of distinct interests—the interest of the mortgagees and the interest of the mortgagor—and although the plaintiff's declaration, if unexplained (and it is said to be capable of explanation), may, as a piece of evidence, be a difficulty in her way, yet it is no estoppel against her in favour of these defendants who were no parties to the settlement of the claim against the other company and are not interested in that insurance if it was of a different interest from that which they themselves insured. If the insurance in the North British and Mercantile Insurance Company was of the mortgagees' interest the plaintiff would derive no benefit from it if the insurance company insisted on being subrogated to the mortgagees' rights, as it would not go in discharge of her mortgage. The mortgagees may have effected that insurance under the power conferred by sec. 18 (2) of the Act respecting Mortgages of Real Estate, R. S. O. ch. 102. So far as we know it was not under any express insurance clause in the mortgage. But, however this may be, and whatever may have been the interests insured, the plaintiff is at liberty to shew, if she can, that the value of the property insured was not exhausted by the insurance of the mortgagees and that something remained to be covered by the policy granted by the defendants. The appeal must, therefore, be dismissed. See *Bull* v. *Imperial Fire Ins. Co.*, 15 A. R. 421; 18 S. C. R. 697; *Castellain* v. *Preston*, 11 Q. B. D. 380.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN, J.A.

The first question in this appeal is the plaintiff's right to sue, having regard to the assignment to R. Walker & Co. The claim is upon an interim receipt, which insures the plaintiff for thirty-six months, on the terms of the company's policy, to be issued within thirty days, unless the risk be declined, in which case it was to cease at the end of thirty days, or sooner in case of notice. The instrument is not under seal, but it is pleaded as a legal and not an equitable obligation of the company, and no objection is raised by the defendants as to its validity or due execution. It is alleged that a policy was issued, but that is admitted not to have been the fact. The Mercantile Amendment Act makes no distinction between legal and equitable choses in action; but the assignee of an equitable chose in action always could sue in his own name, and so could the assignee of a partial interest therein. Our Act relating to the assignment of such property is quite different from the English Act. I think no one can read our Act without seeing that it is only when the whole beneficial interest is assigned that the assignee is required to sue in his own name. In the present case the two assignments which were made were only by way of security, in both cases for a comparatively small sum. I think the present right of action is a legal and not an equitable one. It professes to insure for the whole period, although it was intended that a policy was to issue within thirty days. But even if the policy did not issue the insurance was not to come to an end, unless the risk was declined and notice given. I, therefore, think this action was properly brought in the plaintiff's name, although the assignee might also have brought an action if he had thought fit in respect of his partial interest; and in either case the interest of the other person is a mere question of parties, whose absence is no longer to be fatal.

The other question is whether the Divisional Court was right in granting a new trial; and I think it was, and for

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MACLENNAN, J.A.

the reasons given in the judgments. The correspondence between the plaintiff and the solicitors of the mortgagees constitutes no estoppel as between her and the defendants as to the amount of the loss or damage to the plaintiff's property by the fire. She may be bound as between herself and the mortgagees by the sum accepted by them as for the loss, and her letters may be some evidence against her in the present action; but there is nothing to prevent her from proving, if she can, by other proper evidence, that it was twice or three times the amount accepted by the mortgagees.

I, therefore, think the plaintiff ought to have been allowed to give the evidence of the amount of the loss which she desired to give at the trial, and that the appeal should be dismissed.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal dismissed.

COWAN V. ALLEN.

Will—Construction—Executory Devise—Dower—Practice—Administration Judgment—Adding Parties.

A testator, after devising specifically described properties to each of his three sons, each devise being subject to charges in favour of named beneficiaries, proceeded as follows: "I will and bequeath that should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." One son, after the testator's death and after accepting the devise to him, died without lawful issue, leaving a widow:—

Held, per HAGARTY, C.J.O., and OSLER, J.A., that this clause took effect upon the son's death and gave an executory devise over.

Per BURTON, and MACLENNAN, JJ.A., that the clause was limited to death in the testator's lifetime.

In the result the judgment of ROBERTSON, J., who held that the clause was void as being repugnant to the previous devise, was affirmed:—

Held, also, *per* HAGARTY, C.J.O., and OSLER, J.A., that notwithstanding the executory devise the deceased son's widow was entitled to dower, BURTON and MACLENNAN, JJ.A., expressing no opinion on this point.

Per MACLENNAN, J.A. If a person is improperly made a party in the Master's office after judgment in administration proceedings, he is not limited to moving against the order making him a party, but may appeal from the report.

Statement.

THIS was an appeal by the plaintiff and the defendants Albert W. Cowan and Sarah Macpherson, from the judgment of ROBERTSON, J., and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 3rd and 4th of June, 1895.

Moss, Q. C., and *R. R. Hall*, for the appellants.

Shepley, Q. C., for the respondent Allen.

W. R. Riddell, for the respondent Jean Cowan.

October 29th, 1895. HAGARTY, C. J. O.:—

I feel much difficulty in acceding to the view of the learned trial Judge as to the proper construction of this will.

There is a devise in fee to the testator's son Alexander of his homestead farm burdened with a sum of $100 a year for his widow for life, and $1,000 to each of his brothers Samuel and Albert, with a right of occupation to the

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HAGARTY, C.J.O.

widow in half the homestead, and certain other provisions, declaring that if she did not desire to have such occupation, Alexander should pay his mother $50 per annum in lieu of the use of the half of the house.

The devise to Alexander, is as follows :—

6thly. I will devise and bequeath to my son Alexander Cowan the north half of the north half of lot seventeen, concession four, Township Clarke ;—also the south half of the south half of lot sixteen, concession five, Township Clarke, amounting in all to one hundred acres more or less, subject to his mother's dower of one hundred dollars per annum during her life ; One thousand dollars to his brother Samuel George, and One thousand dollars to his brother Albert Wilberforce, and certain other considerations to his mother in bequest number two.—And which legacies and considerations before mentioned in the several sections hereinbefore written are bequeathed to my wife Isabella Cowan in lieu of dower as interlined in bequest number two.

The devises to the other two sons, are as follows :

8thly. I will, devise, and bequeath to my son Samuel George the west half of the north half of lot number fourteen, concession four, Township Clarke, known as the Doney Farm, containing fifty acres more or less, subject to his mother's dower of fifty dollars per annum during her life ; also the sum of one thousand dollars to be paid to him in two years after my decease with interest at six per cent per annum on the second year only, unless the money shall be paid by the end of the first year, in which case there shall be no interest ; and the said one thousand dollars is to be paid by my son Alexander and chargeable upon the said lands willed to my son the said Alexander.

9thly. I will devise and bequeath to my son Albert Wilberforce the north quarter of lot number fifteen, concession four, township Clarke, containing fifty acres more or less, subject to his mother's dower of fifty dollars per annum during her life and to half the wood my wife will require during her life ; also I will and bequeath to him

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HAGARTY, C.J.O.

the sum of one thousand dollars, payable to him by my son Alexander in four years after my death with three years' interest at six per cent. per annum on said $1000.00.

In section 10 he leaves $100 to the widow of a deceased son David, to be paid equally by his three sons, Alexander, Samuel, and Albert, within a year from his decease if she be then alive.

12. He directs his farm stock to be equally divided between his three sons.

13. After payment of debts, etc., he leaves all moneys, notes, etc., etc., "and all other real estate not set out and described in this my last will and testament," to be equally divided between these three sons.

Then comes section 14, on which the questions in dispute depend:

14thly. I will and bequeath that should any of my three sons die without lawful issue and leave a widow she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage.

The contest is this:—The respondents urge that there was an absolute estate in fee in Alexander, and that clause 14 must be rejected as repugnant.

The appellants admit the devise to be in fee, but insist that it has deen divested under this clause by Alexander's death without lawful issue and leaving a widow.

We understand that Alexander married after his father's death, but died without ever having any issue. His widow survives.

The brothers claim that the estate is theirs, with all the burdens charged on it by the will.

Great stress was laid in the argument as to the charges imposed on Alexander in favour of his brothers, and that it could not be intended that payment of them might have been enforced, and his estate at any time be divested as provided.

No evidence is before us as to the respective values of

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HAGARTY, C.J.O.

the properties devised, or whether the burden of the charges would press unfairly. We may, I suppose, assume that the homestead farm and residence, with 100 acres of land, was the more valuable portion than either of the fifty acres left to each of the others.

It would rather seem from the will, on the whole, that equality of benefit to the sons was the idea of the testator.

It was conceded that there was no direct authority to shew that the imposition of such charges as are here made would of itself prevent the divesting of the estate first granted. Under the old law, such imposition was often considered in determining whether the words in the devise created an estate in fee or only for the life of the devisee.

It is probable that if the testator had had the possible effect of these charges explained fully to him he might have provided against the occurrence of any possible hardship. It may be observed that the money payments by Alexander are deferred in the first case to two years and in the second to four years from his decease, which would somewhat lighten the burden. We are not, however, to discuss the possible unwisdom of such arrangements, if the words of disposition are reasonably intelligible.

I cannot agree that *In re Parry and Daggs*, 31 Ch. D. 130, relied on in the Court below, can be held to shew the repugnancy of this devise over. There the devise was to the son, and if he died without leaving issue then to his next heir-at-law, to whom the testator then gave the estate. The son died in the testator's lifetime without issue.

The devise was held inoperative as designed merely against alienation and placing the heir-at-law as in by purchase instead of limitation, and it was held that the heir took under the original devise and not under the gift over.

It was also held that as the gift over was not on a certain event—as death—but coupled with the contingency of not leaving issue, there was no necessity for limiting the event to the lifetime of the testator.

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HAGARTY, C.J.O.

Holmes v. *Godson*, 8 D. M. & G. 152 may be referred to.

Then it is urged that the death mentioned in section 14 means death in the testator's lifetime. I think this is against the view of Fry, L. J., in *In re Parry and Daggs*, 31 Ch. D. 130, and I am unable to agree with it.

In our case the devise over is not merely on death—a certainty at some time or other—but death on a contingency, viz., without lawful issue, and leaving a widow, for whom a special provision is made, and on this happening the "balance of the estate" is to revert to the brothers. Perhaps the clause would more accurately convey the intention of the testator if it had been in the case of death of any of the three sons without issue the estate should revert to the brothers, and if the son dying left a widow the amount of $50 should be a charge on the estate so reverting, ceasing with her marriage.

The very learned judgments of the Lords in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, seems to me fully to bear out the head note: "A bequest to A., and if she shall die unmarried or without children, to B., is an absolute gift to A., defeasible by an executory gift over in the event of A. dying, at any time, unmarried or without children. This construction can only be affected by a context which renders a different meaning necessary." This is in effect Lord Cairns' judgment.

Our case is not embarrassed by the existence of any life estate created before the period of Alexander's enjoyment.

I think the argument fails as to the contingency in the present case being confined to the lifetime of the testator.

It is then suggested that the devise over is an interference with the rule of descent and of rights as to dower. It appears from such cases as *Moody* v. *King*, 2 Bing. 447; and *Smith* v. *Spencer*, 2 Jur. N. S. 778, that Alexander's widow is entitled to dower, her husband dying seized, although the estate goes over.

It may be that a devise over on a forfeiture, and entry of the devisee in the lifetime of first grantee might create a difference. Neither the cases nor the text writers seem very clear on this point.

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HAGARTY, C.J.O.

The charge of $50 to Alexander's widow so long as she remain unmarried cannot defeat her legal rights as to dower. Alexander left him surviving, his mother, some sisters, and the children of a deceased brother, besides the brothers now before the Court. It cannot be urged that the devisees over were those to whom the estate would go by law in case of intestacy.

I have very fully considered this case, and in the best judgment that I can form, I think the reasonably plain words of the will cannot be explained away so as to prevent the operation of the devise over.

I entertain no reasonable doubt but that the testator clearly meant that as each son died without issue the other two sons should have the estate.

Jean Cowan, Alexander's widow, is entitled to her ordinary rights as to dower, and also to the charge of $50 per annum while she is single.

The appeal should be allowed.

The general rule laid down in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, well explained in such cases as *Olivant* v. *Wright*, 1 Ch. D. 346; *Besant* v. *Cox*, 6 Ch. D. 604; *In re Luddy*, 25 Ch. D. 394.

BURTON, J. A. :—

The general rule is, no doubt, as established by *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, L. R. 7 H. L. 408, that when a will refers to the death of a devisee or legatee, coupled with a contingency—such as death without leaving issue—that *primâ facie* means death whenever it may happen, but the context may shew that death before a particular period was really intended.

I think that, looking at the whole scheme of this will, it is reasonably plain that a contrary intention does appear, and it is quite open to the Court to put a construction upon it which will effectually carry into effect the obvious intention of the testator.

The devises to each of the sons were coupled with very

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BURTON, J.A.

heavy charges, shewing to my mind a clear intention that they should take an absolute and indefeasible estate in fee simple. To hold otherwise would lead to this absurd result: that although the devisee may have paid a large part or the whole of these charges, still he is not in a position to deal with the property devised; he cannot sell it; he cannot lease it safely; he cannot mortgage it, which may be the only means he has to raise money to pay off the charges; he can do nothing with it. That is not a construction a Court could readily come to unless forced to do so by the clear terms of the will. Besides one of the rules of the Court is that in all cases of properties vesting you must make it out as early as possible.

I have come, therefore, to the conclusion that what was intended by this will was that if any of the sons should die in the testator's lifetime without issue, his share, or intended share, should go over to the other brothers, charged, however, in the event of his leaving a widow, with the payment to her of $50 per annum.

I fully agree in the judgment of my learned brother Maclennan, who has gone so fully into the case that I do not think I could usefully add anything to his reasons.

I also agree with him in the disposal of Sarah Macpherson's appeal.

OSLER, J. A.:—

An administration judgment was issued at the instance of Samuel George Cowan on the 16th of June, 1892, for the administration of the real and personal estate of Alexander Cowan, who died on the 30th of January, 1891, intestate and without issue, leaving a widow, the respondent, Jean Cowan, and his brothers, the appellant plaintiff, Samuel George Cowan, and the appellant defendant, Albert Wilberforce Cowan, him surviving. In the course of the reference it became necessary to ascertain what interest the deceased Alexander Cowan had taken under the will (dated 24th of October, 1885) of his late father, James

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OSLER, J.A.

Cowan, in the lands referred to in the sixth paragraph of the will, his brothers the appellant plaintiff and defendant contending that in the events which had happened such lands had passed to them by virtue of the 14th clause of the will. The widow of the intestate, Jean Cowan, and his brother, A. W. Cowan, were added as parties in the Master's office by order in the usual form on the 3rd of October, 1893, and by a further order, dated the 14th of February, 1894, the appellant, Sarah Macpherson, a mortgagee of the plaintiff's interest in the lands subsequent to the intestate's death, was also added as a party. It seems to have been urged at some stage of the proceedings before the Master that none of these three defendants should have been added as parties and that Sarah Macpherson had no interest in Alexander Cowan's estate. These objections were renewed on the appeal from the Master's certificate to Robertson, J. But it also appears that subsequent to the order by which they were made parties these defendants, together with the original plaintiff and defendant, joined in making certain written and signed admissions of fact and in submitting to the Master the following questions thereon :—

1. What estate did Alexander Cowan take under the will of his father, James Cowan, in the lands referred to in the sixth paragraph of said will ?

2. What interest (if any) in said lands survived to the estate of Alexander Cowan ?

3. What rights has the defendant, Jean Cowan, now in the said lands ?

(*a*) By virtue of the said will of James Cowan.

(*b*) By virtue of the death of Alexander Cowan, and her widowhood.

On the 8th of May, 1894, the Master issued the following certificate or report of his answers :—

I certify that pursuant to judgment herein bearing date the 16th day of June, 1892, I was attended by the solicitors for the plaintiff and defendants herein and I find as follows :—

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OSLER, J.A.

1. That Alexander Cowan took under the will of his father, James Cowan deceased, in the lands referred to in the 6th paragraph of said will, an absolute estate in fee simple.

2. An absolute estate in fee simple survived to the estate of Alexander Cowan, subject to the charge thereon to Isabella Cowan as stated in the 2nd paragraph of said will, and also subject to the rights of defendant Jean Cowan, doweress therein.

3*a*. By virtue of the will of said James Cowan, the defendant Jean Cowan has the right to be paid $50 a year so long as she remains unmarried.

3*b*. By virtue of the death of Alexander Cowan, the defendant Jean Cowan is entitled to dower in said lands of her husband, or a distributive portion under the Devolution of Estates Act as she may elect.

From these findings and the certificate all the now appellants appealed to Robertson, J., contending (1) that the Master should have found that Alexander Cowan took under his father's will an estate in fee simple with an executory devise over in fee to the appellants S. G. and A. W. Cowan, which, in the events that had happened, had taken effect, so that the lands formed no part of the intestate's estate; (2) that the Master should not have found that the respondent Jean Cowan was entitled to dower in the lands in question or a distributive share under the Devolution of Estates Act, as she might elect, or to any other interest therein than the annuity of $50 per annum bequeathed to her by said will so long as she remained unmarried; (3) that the certificate did not set aside and discharge the order adding the appellant Macpherson as a party in the Master's office.

The appeal was dismissed, the learned Judge holding that the intestate took under his father's will an estate in fee simple absolute, and that the 14th clause of the will, under which the appellants claimed, was repugnant and void, "the result," as he expressed it, "being that the lands in question will devolve on the two surviving

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brothers of Alexander Cowan as his next of kin, and his widow, should she elect to take under the Devolution of Estates Act, instead of her dower, her share under the Act."

He held also that Macpherson had been properly made a party in the Master's office.

The objection as to parties is, I think, not properly before us, even if under any circumstances it could have been raised by the defendant Macpherson, after having joined in the admission of facts on which the questions were submitted to the Master. Whether she should have been made a party or not, was not one of those questions, nor was the Master dealing with a motion by her to discharge the order. The appeal to the Judge below was necessarily limited, as is also the appeal to us, to the Master's disposition of those questions by his certificate of the 8th of May, and by the notice of motion the appeal below is expressly taken as an appeal from that certificate only. I am not to be understood as concurring in the opinion that she was a proper party. I dispose of the appeal on this point on the ground that as the proceedings stand it is not a competent one.

The questions, therefore, before the Master and now before us, substantially were and are: (1.) What interest the deceased Alexander Cowan took under the will of his father James Cowan; and, (2.) What interest or rights the appellant Jean Cowan, Alexander's widow, has in the land devised either as his widow or under the will. Before proceeding to consider these questions, it may be as well, however, to notice that if Alexander Cowan took, as the learned Judge below held, an estate in fee simple absolute under his father's will, the lands did not devolve, as he also appears to have held, upon his two surviving brothers alone, upon his death intestate, as his next of kin. That was not a question before the learned Judge for decision, and enough appears to shew that there are probably several other persons interested and entitled to share in the property under the Devolution of Estates Act.

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OSLER, J.A.

The important clauses of the will are the 6th, 12th, 13th and 14th. By the 6th the testator devised to his son Alexander Cowan, the lands in question, subject to an annuity previously given to the widow in lieu of dower and other bequests to her, and also subject to legacies of $1,000 each to his brothers Samuel George and Albert Wilberforce Cowan. By the 12th the testator willed and bequeathed his stock and farm implements to his three sons Alexander, Samuel George and Albert Wilberforce Cowan, "and if any of them is not 21 years of age at my decease his portion if he should not require them to work his own land shall be sold and the money invested until he is of age."

By the 13th clause it was directed that after payment of debts and funeral expenses and for a monument, etc., all moneys, stocks, accounts, mortgages and outstanding debts of any and every kind, and all other real estate not already disposed of by the will should be equally divided between the testator's three sons, Alexander, Samuel George and Albert Wilberforce Cowan. And by the 14th clause the testator willed and bequeathed "that should any of my three sons die without lawful issue and leave a widow she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." The learned Judge held that the devisee, Alexander Cowan, took an absolute estate in fee simple and that the gift over in the 14th clause was repugnant and void. He arrived at this conclusion on the authority of *In re Parry and Daggs*, 31 Ch. D. 130, which he considered to be in point and not distinguishable from the present case.

I believe we are all of opinion that the judgment cannot be supported on the ground on which he has put it, and that the cases cited by him are not applicable. In the case at bar the devise is in fee with a gift over on the death of the devisee without lawful issue and leaving a widow (if that be one of the contingencies) and this gift

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over is to strangers to the earlier gift, namely, to the other two sons of the testator.

In *In re Parry* v. *Daggs*, 31 Ch. D. 130, the devise was to the testator's son in fee, "and in case my said son shall die without leaving lawful issue then and in such case the estate and premises hereinbefore devised to him shall go to his next heir-at-law, to whom I give and devise the same accordingly." The gift over was held invalid on the ground that it was a mere device to restrain alienation during the lifetime of the son, having no other effect or operation, and the reasons given in the judgment of Fry, L.J., shew clearly why that is so, and the radical difference between that case and the present. "It was argued," he says, "that the gift over cannot take effect as an executory devise because the only operation of it would be to give an estate in fee simple to the heir, who would have taken the same estate if there had been no such gift; that therefore it is a gift which would not alter the devolution of the estate, but that its only effect would be to prevent the alienation of the estate and that it is therefore invalid. * * The testator's son is devisee in fee, and on his death either one of his issue will be his heir, or some one else. If his heir be his issue, such issue will take under the original devise and the gift over does not arise: if his heir be some one not his issue, such heir would take equally under the original devise and under the gift over: so that the operation of the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal device and consequently the gift over is void."

In our case the gift over being to the brothers of the original devisee the devolution of the estate is completely altered and none of the reasoning on which the gift over in the case cited was held to be void applies.

In re Dugdale, Dugdale v. *Dugdale*, 38 Ch. D. 176, is another case relied on by the Court below. In that as in the former case it was held that the attempted executory gift over was a mere device to restrain the alienation of

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the property. The events on which it was to take effect were, 1st, alienation, *i.e.*, any alienation whatever, by the devisee, and 2nd, bankruptcy or judgment and execution. That case, therefore, is one in which, having regard to the peculiar form of the limitation, *i.e.*, not giving an interest *until* alienation, but giving an absolute interest subject to a proviso restraining alienation, it was held void as merely intended to take effect in derogation not only of the right of alienation, but also of the natural incidents of the estate which it was intended to divest, as, for example, its liability to be attached by creditors on a bankruptcy or judgment. See also per Cotton, L.J., in *Corbett* v. *Corbett*, 14 P. D. 7, 10.

Assuming, therefore, that the contingency of dying without issue is to be referred, not to death in the testator's lifetime, but to death at any time, as the learned Judge held, I am unable to agree with him that the gift over in the 14th clause is repugnant and void.

The authorities which, in my opinion, are to guide us in the construction of this will, are *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Ingram* v. *Soutten*, L. R. 7 H. L. 408, and similar cases. To what period is the contingency or the double contingency on which the estate is to go over to be referred? To the death of the original devisee in the lifetime of the testator, or to his death at any time? If to the former, then the gift over never could take effect, as the devisee survived the testator; and the judgment below should be affirmed on that ground.

But to this conclusion, I am, after much consideration, unable to bring myself. To quote the language of Lord Cairns, as paraphrased in the head note to *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, there is no authority that the words introducing a gift over in the case of the "death, unmarried, or without children, of a previous taker, do not indicate according to their natural meaning, death, unmarried, or without children at any time, or that the ordinary and literal meaning of the words used is to be departed from otherwise than in consequence of a context which renders

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a different meaning necessary or proper." And in *Ingram* v. *Soutten*, L. R. 7 H. L. 408, where the bequest was to "Mary H., her executors, etc., and in case Mary H. shall depart this life without leaving any issue of her body living at the time of her decease," then over, it was held that the natural meaning of these words was the dying of Mary H. without issue living at the time of her death at whatever time that death might happen; on that event happening the fund went over.

I refer also to what is said on this subject by Fry, L. J., in *In re Parry and Daggs*, 31 Ch. D. 130.

I do not think there is anything in the context or other provisions of this will which justifies us in placing upon the words of the 14th clause a construction different from that which they naturally bear, or in holding that (to use the language of Lord Selborne, in *O'Mahoney* v. *Burdett*, H. L. 7 L. R. 388, at p. 406) the devisee was intended in some event to take an absolute interest; and that such intention, therefore, "cannot in any event receive effect unless the operation of (the) divesting clause is limited to a time earlier than the (devisee's) death:" *i.e.*, earlier than his death at any time, and limiting it to his death in the lifetime of the testator. There are, no doubt, several cases, most of which were cited to us, where the context or the other provisions of the will required such a construction: *e.g.*, *Jones* v. *Davies*, 28 W. R. 455; *Besant* v. *Cox*, 6 Ch. D. 604; *In re Luddy*, 25 Ch. D. 394; *Olivant* v. *Wright*, 1 Ch. D. 346, but they are cases where the intention appeared, as it may be said, in express words.

I do not regard the circumstance of the property being charged with an annuity in favour of the mother and with legacies in favour of the testator's brothers as a controlling one. The same thing existed in the cases of *In re Parry and Daggs*, 31 Ch. D. 130, and *Moody* v. *King*, 2 Bing. 447, where the contingency of death was, nevertheless, referred to death at any time and not in the lifetime of the testator. No doubt this construction might conceivably have been

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productive of some difficulty and hardship had Alexander Cowan desired to raise money upon the land to pay the incumbrances, and it might seem hard that he should have paid them and yet be subject to have his estate divested upon the happening of the contingency, but I think it is not enough to warrant us in saying that the testator's intention was different from that which his language plainly expresses, the giving it that meaning "not leading to a palpable absurdity or violating some rule of law": *Palmer* v. *Orpen*, [1894] 1 I. R. 32. See also *Bullock* v. *Downes*, 9 H. L. C. 1, 24. Therefore I am of opinion that in the events which have happened the executory devise took effect in favour of the appellants, S. G. and A. W. Cowan, and that the lands now belong to them in fee simple subject to the annuities in favour of the widow of the testator and the widow of Alexander Cowan.

The next question is whether Alexander's widow is dowable of these lands, her husband's estate in which was determined by the executory devise over in consequence of his death without leaving issue. This question, though at one time much debated in the books, seems to be settled in the widow's favour by the cases of *Moody* v. *King*, 2 Bing. 447, and *Smith* v. *Spencer*, 2 Jur. N. S. 778 (1856).

In that case Stuart, V.-C., said: "It could not be necessary to hold that the estate of which the husband died seized was an estate transmissible to his heir, in order to entitle the wife to dower; because it was certain and undoubted law, that if there be a tenant in tail, with a remainder over in fee, although the tenant in tail should die without leaving any issue, so that the estate in remainder in fee took effect, the wife was dowable as against the remainderman; and in principle it seemed impossible to say that an estate, of which the tenant in tail was seized at his death for an estate tail, could be in any respect different from an estate given to a tenant in fee simple who died seized of that estate, but because he died without leaving a child an executory devise over took effect. The principle seemed

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OSLER, J.A.

the same in both cases." He held, therefore, that the widow of the tenant in fee simple, notwithstanding that the executory devise over took effect, was entitled to dower as against the executory devisee.

A distinction exists between those cases in which the husband's estate is defeated by title paramount or by reason of forfeiture and those in which it passes from him by conditional limitation or executory devise. In Washburn on Real Property, 5th ed. (1887), pp. 178, 272, 276, where a full discussion of the subject will be found, it is said that the tendency of modern English and American cases seems to be to sustain the distinction in favour of dower out of estates which have been determined by executory limitation, citing the above cases and *Evans* v. *Evans*, 9 Pa. St. 190; *Hatfield* v. *Sneden*, 54 N. Y. 285. In Jarman on Wills, 5th ed., p. 836, it is said: "An immediate estate in fee defeasible on the taking effect of an executory limitation has generally all the incidents of an actual estate in fee simple in possession, such as courtesy, dower, etc., the devisee having the inheritance in fee subject only to a possibility." See also Bisset on Estates, pp. 82, 87; Roper on Husband and Wife (Add.), p. 502; Park on Dower, 177.

In these lands, which do not devolve upon or become vested in her husband's legal personal representative, it is needless to say, except for the purpose of formally answering the questions submitted, the widow can take no other or further interest under the Devolution of Estates Act. Had they so devolved it might have been necessary to consider what her position was in respect to them under that Act apart from her right to dower, but that is a question which, under the circumstances, cannot now arise in the case.

The appeal of S. G. Cowan and A. W. Cowan and the appeal of Macpherson, so far as she made common cause with them, must be allowed. Her appeal from the order making her a party must be dismissed.

MACLENNAN, J. A.:— Judgment.

MACLENNAN, J.A.

The first question is upon the construction of the will of the testator, James Cowan, so far as relates to the land devised to his son Alexander. The testator made his will on the 24th of October, 1885, and died on the 13th of August, 1886, leaving a widow, three sons, one daughter, and the children of a deceased son William. By the 2nd clause of the will the testator gave his wife $300 a year in lieu of dower, and directed that $100 a year of that sum should be paid by his son Alexander, and be charged upon the land devised to him; and $50 a year by each of his other two sons and his daughter, and to be charged upon land devised to them respectively; and the remaining $50 a year by his grandsons, the sons of his deceased son Thomas, and to be charged upon land devised to them.

By the 6th clause, he devised to his son Alexander one hundred acres, subject to the $100 a year already mentioned in lieu of dower; and also subject to $1,000 to be paid to each of his other two sons.

By the 8th clause, he devised to his son Samuel George fifty acres, subject to the $50 a year in lieu of dower to his mother; and he also gives him the $1,000 mentioned in the 6th clause, and he declares that this sum is to be paid by Alexander, and to be charged on the land devised to him, and to be paid in two years after his decease, with interest at six per cent. per annum for the second year only, unless it should be paid at the end of the first year, in which case there was to be no interest.

By the 9th clause, he devised to his son Albert fifty acres subject to the $50 a year to his mother; and he also bequeathed to him $1,000 payable by Alexander in four years after testator's death, but with only three years' interest thereon.

He also gave fifty acres to his daughters, and fifty acres to the children of his deceased son William, the terms of which last two gifts need not be further more particularly mentioned. By the 10th clause he gave $100 to the

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MACLENNAN, J.A.

widow of his deceased son David, to be paid equally by his three sons within one year after his decease in case she should then be alive.

By the 11th clause he directed that should any of his sons who should not be twenty-one at testator's death not wish to work the land willed to him, the executors should lease the land until he should arrive at majority, and deposit the rent in some bank until he should be twenty-one.

By the 12th clause he gave his stock and farm implements to be divided equally between his three sons, and he provided that if any of them should not be twenty-one at his own decease, his share should be sold and the proceeds invested until he should be of age.

By the 13th clause he directed the payment of his debts, etc., and that all moneys, notes, accounts, stocks, mortgages, etc., and all real estate not set out and willed, and described in his will, should be equally divided between his three sons.

Then came the 14th clause which is as follows:

"14thly. I will and bequeath that should any of my three sons die without lawful issue and leave a widow she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried and the balance of the estate shall revert to his brothers with the said fifty dollars on her marrage."

This is the clause which creates the difficulty. Alexander survived his father, but is dead, without having had issue, and leaving a widow. The other two sons claim that Alexander's estate has under these circumstances reverted to them subject to the $50 a year to Alexander's widow, the defendant Jean Cowan, for life, while the defendant Allen, as administrator of the estate of Alexander, contends that Alexander's estate was a fee simple absolute at his death and did not revert to his brothers. The defendant, Sarah Macpherson, holds a mortgage made by the plaintiff Samuel after Alexander's death, and makes the same contention as the plaintiff her mortgagor.

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MACLENNAN, J.A.

The learned Master, at Cobourg, before whom the question arose upon an order for the administration of the estate of Alexander, decided that Alexander died seized of a fee simple absolute, but gave no reasons for his conclusions. That decision has been upheld in appeal by Mr. Justice Robertson, who held, chiefly upon the authority of *In re Parry and Daggs*, 31 Ch. D. 130, and *In re Dugdale, Dugdale* v. *Dugdale*, 38 Ch. D. 176, that the gift over in the 14th clause in the event of death without issue leaving a widow, was repugnant to the previous gift of the estate in fee and was therefore void.

I am unable, with great respect, to uphold the judgment on the ground of repugnancy or on the authority of these two cases. *In re Parry and Daggs*, 31 Ch. D. 130, was decided on the ground that the gift over being to the devisee's next heir-at-law in case of his death without leaving issue was not a gift over to some one else than the devisee, but merely an attempt to fetter the power of alienation during his lifetime; was, indeed, the same as if it had said, if he has no issue then no deed or will that he may make shall be valid. *In re Dugdale, Dugdale* v. *Dugdale*, 38 Ch. D. 176, was a similar case, but one in which the attempt to fetter the power of alienation was plainly expressed, and the gift over was held to be repugnant and void.

In the present case, however, there is no attempt to fetter the power of alienation, and the gift over is not to the persons who would be the testator's heirs-at-law. The Devolution of Estates Act, which came into force on the 1st of July, 1886, shortly before this testator died, is applicable to his estate, and by section 10 his personal representative is to be deemed his heir, and in case of intestacy not only his brothers but his mother and sister and his nephews would be entitled to share his estate. The gift over in the present case is wholly unlike the one in question in *In re Parry and Daggs*, 31 Ch. D. 130, and cannot, therefore, be governed by it. The judgment of the Court of Appeal in *Corbett* v. *Corbett*, 14 P. D. 7, shews that such a gift over as the present is not repugnant.

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MACLENNAN, J.A.

Putting aside the ground of repugnancy, then, is there any ground on which the validity of the gift over can be successfully attacked? It was contended that the cases of *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, L. R. 7 H. L. 408, were conclusive that the death without issue mentioned in the 14th clause meant death at any time, and that there was no room to contend that it meant death in the lifetime of the testator. I have come to the conclusion, after much consideration, that this will is not governed by these cases, and that there is enough to be found in its provisions to exclude the general rule established by them.

On examining the will as a whole, it is apparent that so far as concerns the property given to his three sons, he intended it for their benefit, for them and for no one else. He not only gives it to them absolutely, but in the gift over he does not give it to any one else; the benefit of it is still to be confined to them or one of them. Again it is apparent that his desire was to place his three sons upon a footing approaching equality. He gives Alexander his homestead, 100 acres; and each of the others 50 acres, but requires Alexander to pay his two brothers $1,000 a piece. The only object of imposing upon Alexander the obligation of paying these two sums, must have been the desire to produce equality. He also imposes on Alexander the payment of $100 a year to his mother in lieu of dower; while each of the others is only charged with $50. Again the three sons are to pay the legacy to David's widow in equal shares, and the stock and farm implements are to be divided equally between them. And finally, all the residue of his estate is also to be divided equally between them.

The general scheme of the will, therefore, with regard to the property willed to the three sons, and which alone is affected by the 14th clause, is the benefit of those sons and them alone; and, moreover, that there should be equality of division between them. They were evidently young men, one or more, and perhaps all of them, still under twenty-one, as may be inferred from clauses 11 and 12.

Judgment.

MACLENNAN, J.A.

How then is that general purpose of the testator for the exclusive and equal benefit of his three sons affected by clause 14?

The first question to be considered upon it is, what is the meaning of the words, "out of his estate," and "the balance of the estate," used in that clause? Do they mean the land only of the son dying without issue, or do they include the gifts of personal estate as will? I am unable to perceive any reasonable ground on which it can be contended that these words are confined to the land, and do not extend to the other gifts also. In the 1st clause of the will the testator uses the word "estate" as comprehending all his property of every kind; and I think he must be taken to have used it in the same general sense in the 14th clause. The rule in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, is not confined to land. In that case it was a sum of money, and in *Ingram* v. *Soutten*, L. R. 7 H. L. 408, it was a mixed fund, which was the subject of the gift. Therefore, if Alexander's land has passed to his brothers by reason of his death without issue and leaving a widow, all the other property given to him must equally be held to have become their's as well. Then what would be the effect of holding that the death referred to in clause 14, and upon the occurrence of which the gifts to the sons were to go over, might occur at any time? Take the case of Alexander. He takes possession and lives to the 30th of January, 1891, more than four years after his father's death. He has paid his mother $100 a year for four years. He has paid his brother's widow Jean, his share of her legacy. He has received his share of the farm stock and implements, and also his share of the residue of his father's estate. He has also paid $1,000 to each of his brothers. He has married, but has no children, and he dies leaving a widow. It is said that during all that time, and at the moment of his death, his title to what he received under the will, the land, the farm, stock and implements, his share of the residue, was defeasible, and at his death was defeated, shifted away, and

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became the property of his two brothers, with the exception of $50 a year to his widow *dum sola*. The $2,000 are paid out of his own money, so also the $100 a year paid to his mother, and the property which he fondly hoped was his is all swept away.

To my mind it is impossible to suppose that the testator intended that after Alexander had paid the $2,000 to his brothers his estate should be defeasible. He was quite a young man, the son of a farmer, presumably not possessed of independent means wherewith to pay these sums, and yet if the construction contended for is to prevail, he could not raise the money wherewith to make the payments by mortgage of the land devised to him, or of the personal property either, for no one would lend it on a title liable to come to an end at any moment. Upon such a construction his father's gifts would indeed be to Alexander *damnosa hereditas*.

Now, the rule established by *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, is merely a general rule, a rule of construction only *primâ facie* applicable as being the natural meaning of the language used in the ordinary case, and a rule which yields to a context inconsistent with such a construction and requiring that the death which the testator meant should be regarded as death at some other time, as, for example, in the testator's own lifetime or before the period of distribution. Cases which exemplify such a departure from the general rule are to be found of a date both before and since that case. One of the earlier cases was *Barker* v. *Cocks*, 6 Beav. 82, before Lord Langdale. In that case a fund was given to the testator's wife for life and at her decease to A. B. and C., to be equally divided between them, share and share alike, but in case of the death of C. without leaving lawful issue he gave her third part to A. and B. equally, and it was held that C., having survived the testator's wife, had acquired an absolute interest. The Master of the Rolls said the first object of the testator was that the three legatees should enjoy the property share and share alike. Each was to have an equal advantage

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MACLENNAN, J.A.

with the others, but as to C.'s share, there was a gift over to the others in case of C. dying without lawful issue. If you make the dying without leaving lawful issue refer to the period anterior to the death of the tenant for life you carry into effect the primary intention of the testator to divide the fund among the three share and share alike.

Another case is *Olivant* v. *Wright*, 1 Ch. D. 346, a decision of the Court of Appeal after *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388. There real and personal estate was given by the testatrix to her husband for life, and after his decease to be divided amongst her five children, share and share alike, and if any should die without issue that child's share should be divided, share and share alike, among the children then living; but if any died leaving issue then that child, if only one, should take its parent's share, and if more than one to be divided equally amongst them share and share alike. It was held by the Court of Appeal, reversing Bacon, V.-C., that the will meant death before the time of division, on the ground that the testatrix intended a final division to be made at the death of the tenant for life, that all was consistent with that intention and that any other construction would lead to so many absurdities and contradictions that there could not be any doubt.

The next case was *Besant* v. *Cox*, 6 Ch. D. 604, in which Malins, V.-C., followed *Olivant* v. *Wright*, 1 Ch. D. 346, and with reference to the will before him, observed that he was satisfied from its language that the intention of the testatrix was not to tie up the devisees during the whole of their lives, rendering the property inalienable and comparatively useless as long as they lived.

In re Luddy, 25 Ch. D. 394, is another case in which Kay, J., held that the general rule was excluded by the context of the will. There the testatrix directed the trustees to convey her residue to her son, his heirs, etc., absolutely, and if he should marry and should die leaving children who should live to attain twenty-one, the trustees were to convey the residue to such children equally, but

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if her son should die in her lifetime without leaving a child or children surviving then over. The son married after the will in the lifetime of the testatrix, survived, and had children living. It was held that death leaving children meant death in the lifetime of the testatrix, and the son having survived, he became absolutely entitled.

In his judgment the learned Judge laid much stress upon the direction to convey the residue to her son, as indicating that the interest which he was to take was an absolute interest, and that the primary object of the bounty of the testatrix was her son.

In the present case there is not only the direct and express gift by the testator himself to each son of their respective parcels of land, but a direction to divide the farm stock and implements equally between them if of age, and if not that the share or shares of any under age should be sold and invested until he or they should be of age. So also the residue of his property of every kind is to be equally divided between them.

I think the principle of these decisions, not only warrants, but requires us to hold that the testator meant the gift over, provided for in the fourteenth clause of this will, to depend on death in his own lifetime, and not of any later period. I think this conclusion is greatly strengthened by the observations of Lord Selborne in *O'Mahoney's* case at page 406. He says: "A like conclusion (that is that the contingency must be intended to happen, if at all, before a particular period) may also, *primâ facie*, be arrived at when the language of the will shews that the legatee was intended, in some event, to take an absolute interest, and when that intention cannot in any event receive effect unless the operation of such a divesting clause is limited to a time earlier than the legatee's death." Now I think this whole will, so far as the sons are concerned, shews the intention of the testator that they should take absolute interests, and that the divesting clause must therefore be limited to his own lifetime.

The extraordinary effect of the other construction is not

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MACLENNAN, J.A.

exhausted by considering the case of Alexander. The surviving brothers seem to think that their titles are now absolute, at all events to Alexander's land. But that is clearly not so. Either of them may die just as Alexander did, without issue, that is, without issue living at his death and leaving a widow, in which case his estate would go over just as Alexander's did, and I see no reason why the accrued share should not go over as well as the original share, for the accrued share is part of his estate derived under the will, just as much as the other. What would happen if the third brother died within the condition also is not very clear, and I need not stop to consider. But one thing is quite clear, that if the construction contended for by the appellants is to prevail, then these brothers might all have lived to a patriarchal age, and yet all die without issue, and leaving a widow, and during all that time their respectives shares of property under this will would have been inalienable, and liable to be defeated, and such is the position in which the respective titles of the two brothers stand at the present moment.

But if the other construction be adopted, that the death referred to as death during the testator's lifetime, all is consistent and harmonious. The manifest intention of the testator is effected in the most perfect manner. Alexander need not be afraid to accept the benefits which his father intended for him, lest he shall be unable to make the payments imposed upon him by borrowing the money on the land, or lest, when he has paid them, he should by death without issue lose the land and other property given to him, and his own money too. The three sons having survived, became absolutely entitled to what their father intended for them, and can use it and deal with it in the most beneficial manner. Their widows, too, in the event of death in the testator's lifetime without children, would receive a reasonable provision, and in the event of death afterwards, would also be provided for, being entitled to dower. Indeed the primary purpose of clause 14 would seem to be the making of some provision for the widow

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in case of a lapse by the death of her husband in the testator's lifetime. It is made to cease on her marrying again, for being without children she would, on marrying again, cease to stand in any relation to the testator, and would be provided for by her second husband. So also her provision is confined to the case of there being no children, for if there were children living, then by section 36 of the Wills Act, the children would take their father's share, and their mother would be supported by them, and perhaps would also be entitled to dower.

When penning the provision for the widow, it occurred, as it seems to me, to the testator, that he had made no provision for lapse, and that to prevent partial intestacy, he ought to do so; and, therefore, provided that the "balance of the estate," of any one dying without issue, should go to his brothers.

With reference to the effect which ought to be given to the payments imposed upon Alexander as a condition of accepting the benefits of the will, as indicative of intention that the gifts should be absolute, I may refer to the decisions before the Wills Act, that when a devisee whose estate was undefined, was directed to pay the testator's debts or legacies, or a specific sum in gross, he was held to take a fee, on the ground that if he took an estate for life only, he might be damnified by the determination of his interest before reimbursement of his expenditure. The rule was confined to undefined devises, where otherwise the ordinary meaning would be an estate for life. Here, according to the rule, the ordinary natural meaning of death, coupled with a contingency, is death at any time, and just as in these old cases, so here the imposition of a burden upon the devisee should be sufficient to warrant the confinement of the period of death to the lifetime of the testator, in order that the devisee might not be damnified instead of being benefited by the bounty of the testator.

For these reasons I am of opinion that Alexander, having survived his father, became absolutely entitled to the benefits given to him by his will.

Judgment.

MACLENNAN, J.A.

The other question in this appeal is whether Sarah Macpherson was properly made a party in the Master's office.

The reference is for the administration of the son Alexander's estate, not the estate of the testator, James Cowan. Sarah Macpherson in no way claims under Alexander, but by an independent title under James Cowan's will and by mortgage from the plaintiff Samuel George Cowan, and it is clear that her title cannot be tried on a reference for the administration of the estate which claims title adverse to her. Her right is to have her title tried in an action properly instituted for that purpose. I am surprised that it should have been supposed that her title could be attacked in the Master's office. Even the ordinary debts of a deceased person cannot be collected summarily by bringing the debtors into the Master's office in an administration suit, but they must be sued in the usual way in the proper Court. Much less can it be supposed that the Master may recover lands claimed adversely to the estate by making the adverse claimants parties in his office.

It seems that Sarah Macpherson has objected and protested at every stage that she was improperly brought into the Master's office, but she never moved against the direction of the Master served upon her in pursuance of Rule 46, as she might have done. That would have been the convenient course, and I think it is the usual course; but without consent I think that if improperly made a party she cannot be bound by anything that is done. It was argued that Rule 48 obliged her to move at the peril of being bound, but that is not what Rule 48 means. The reference to the Master is always by a judgment, or order of some kind: see Rule 45. Then Rule 46 authorizes the Master to direct an office copy of the judgment or order, that is the judgment or order of reference, to be served upon the persons who he thinks ought to be made parties. By Rule 47 the office copy of the judgment or order when served is to have a notice endorsed upon it in form 33 of the Appendix.

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Then what Rule 48 says, is that a person served with an office copy of a judgment or order under Rule 46 may apply within fourteen days to discharge the judgment or order, or to add, to vary, or set aside the same. That rule, therefore, has no reference whatever to an application to set aside the Master's direction making a person or party to the proceeding before him. If such a person when served do not move against the judgment or reference within the time limited, he is to be bound by it, and also by the subsequent proceedings. But if he objects to the Master's jurisdiction to deal with his rights and interests, and if the Master assume to do so, I see no reason why such a person may not appeal from the Master's report on that ground, as well as on any other, and if the objection is apparent on the face of the report, have the benefit of the objection on further directions without appeal from the report at all. Sarah Macpherson appealed from the report on that ground, and she also insisted on the same objection before us, and I think she was entitled to do so.

I think, therefore, that while the appeal fails upon the question of the construction of the will, Sarah Macpherson is entitled to succeed on her appeal as having been improperly brought into the Master's office.

She has, however, made common cause with the other appellants on the question of construction, and having succeeded in part and failed in part, she should neither have nor pay costs of this appeal, or of the appeal from the report, but I think she should have against the party at whose instance she was brought into the Master's office the costs of a successful motion to set aside the service of the order and in his making her a party. The appellants, Samuel and Albert Cowan, should pay the costs of this appeal and of the appeal from the Master to the respondents Allen and Jean Cowan.

Appeal dismissed, the members of the Court being divided in opinion.

BELL V. GOLDING.

Easement—Abandonment—Sale of Land—Sale by Plan—Lane not in Use.

Abandonment of an easement may be shewn not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement.

Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was held that the owner of the dominant tenement could not then have the right of way opened.

Mykel v. *Doyle*, 45 U. C. R. 65, considered.

Per MACLENNAN, J. A. A conveyance made in pursuance of the Short Forms Act, of a lot according to a registered plan upon which a lane is laid out does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendant from the judgment of ROBERTSON, J. Statement.

The following statement of the facts is taken from the judgment of MACLENNAN, J. A.:—

One Marshall being the owner of a parcel of land in the town of Brampton in the form of a parallelogram, nearly rectangular, at the intersection of Queen and Main streets, subdivided it into five building lots, numbered consecutively. Lots one, two and three, composed of about one-third of the whole parcel, were laid out on the Main street frontage, with a lane in rear twelve feet wide, extending across the parcel and parallel to Main street. The remainder of the parcel was divided into lots four and five, with their frontage on Queen street, lot four adjoining the lane, and lot five separated from lot four by a line parallel to the lane. Besides extending from Queen street across the whole parcel, the lane was also extended and laid out in rear of lot four, of the width of twelve feet, until it reached the line between four and five, and it went no further. It is an easement of a way over this lane from the rear of lot five to Queen street, which is claimed

Statement. by the plaintiff, the owner of lot five, against the defendant, the owner of lots one and four, and also of the lane. The judgment is in favour of the plaintiff, affirming his right to the easement and ordering the removal of buildings by which its use as a way is obstructed, and the defendant has brought this appeal. On making the subdivision of the land Marshall had a plan thereof prepared, and it was registered on the 22nd of June, 1868, as required by the Registry Act which had then lately been passed. The plan shews the lots with their dividing lines and numbered as already mentioned, and also the lane, marked as such by the word "lane" written thereon in two places, namely, at the side and at the rear of lot four. The position of Queen street and Main street is also shewn thereon. On the 27th of October, 1869, Marshall conveyed to one Clark, lots one, four and five, and also the lane, and a few days afterwards Clark conveyed the same parcels to the defendant. On the 14th November, 1871, the defendant, being still the owner of the parcels conveyed to him by Clark, conveyed lot five to Charles Dawson by deed in the usual form, describing the land as follows: "All and singular that certain parcel or tract of land and premises situate, lying and being in the said village of Brampton, being composed of part of the easterly half of lot number five in the first concession west of Hurontario street in the township of Chinguacousy in the said county of Peel, now in the said village of Brampton, and may be better known and described as village lot number five on Queen street west, in the said village of Brampton, according to a plan of subdivision of the Marshall block drawn by A. B. Scott, provincial land surveyor, May 1st, 1868, and filed in the Registry Office in the said county of Peel."

Afterwards lot five passed through several owners, and in November, 1891, it was conveyed to the plaintiff, whose conveyance, as well as all the mesne conveyances, is in the same form as that to Dawson. None of these conveyances contains any grant of an easement of or way over the lane in question, except that they are all deeds made

Statement.

under the Short Forms Act, R. S. O. ch. 105, and therefore may be held to convey all ways "belonging or in anywise appertaining" to lot five, "or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof." The evidence is that from a period before the conveyance of lot five to Dawson continuously down to the commencement of the action there was a fence erected and maintained at the end of the lane in rear of lot four, where the lane abuts upon lot five, closing the lane up at that end and obstructing all access thereto from lot five. The lane was further obstructed during the same time continuously, first by an ice-house, built by the defendant, and covering the whole width of it at or near the end of the lane next to lot five, and afterwards by a stable, erected about fifteen years before the trial by the defendant, on or near the site of the ice-house, and which remains there still; so that neither before nor at or after the date of the conveyance to Dawson, or at any time since, was the lane ever used or capable of being used, occupied or enjoyed with lot five, or taken or known as part or parcel thereof.

The action was tried at Brampton, on the 20th of September, 1895, before ROBERTSON, J., who, on the 31st of December, 1895, gave judgment in the plaintiff's favour.

The defendant appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of March, 1896.

Armour, Q.C., and *T. J. Blain*, for the appellant. The right to use the lane in question, if it ever existed, was abandoned by the predecessors in title of the plaintiff, and that abandonment, followed by acts of ownership by the defendant and his predecessors in title with the knowledge of the plaintiff and his predecessors in title, has effected an extinguishment of the right of way: *Stokoe* v. *Singers*, 8 E. & B. 31; *Crossley* v. *Lightowler*, L. R. 3 Eq. 279, at p. 293; affirmed, L. R. 2 Ch. 478; *Cook* v. *Mayor of Bath*,

Argument. L. R. 6 Eq. 177; *Drewett* v. *Sheard*, 7 C. & P. 465. The evidence shews that the obstruction now complained of has existed for twenty years, and there is, therefore, a bar under the Statute of Limitations. It has been held in *Mykel* v. *Doyle*, 45 U. C. R. 65, that the Statute of Limitations does not apply, but this case should be overruled. The interpretation clause of the statute enacts that land shall include an incorporeal hereditament, which an easement is. An action could have been brought to assert the right to the easement, and not having been brought the right is now barred.

W. H. McFadden, for the respondent. The plaintiff acquired by his purchase the right to the use of this lane, and the defendant cannot now contend that the right to use the lane is gone: *Sklitzsky* v. *Cranston*, 22 O. R. 590. The evidence does not shew obstruction for twenty years, but, even if it did, that would make no difference. An easement once acquired cannot be lost by lapse of time. *Mykel* v. *Doyle*, 45 U. C. R. 65, is a direct authority on the point and is well decided.

Armour, Q.C., in reply.

May 12th, 1896. BURTON, J. A.:—

Assuming that if the lane in question here had been open and in use at the time that the plaintiff acquired his title to lot 5, the right to use it would have passed to him, as to which I offer no opinion, the finding of the learned Judge, amply supported by the evidence, that the lane in question never was used by Marshall or any of his successors in title, and the fact that at the time the defendant sold to Dawson the lane was not used as a way, and was incapable of being so used, and had been obstructed by buildings and enclosed within a fence running from the rear of lot 5 to Queen street, which state of things continued for more than twenty years, makes me feel that the only proper conclusion to come to upon that evidence was

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BURTON, J.A.

that any implied grant of an easement had been revoked by the defendant and acquiesced in by his vendee.

As I understand the law in reference to selling lots according to a plan the effect of it, as regards any alleys shewn upon it and on which the lots abutted, is that it amounts to a dedication of them to the use of the persons who should thereafter become owners of such lots, but not to the use of the general public or of the owners of lots in a different locality. Take the bald case, therefore, of a sale of this lot 5 according to the plan, it might well be that the purchaser could claim to have the easement or right of way shewn upon the plan, but the title to both lots 4 and 5 had become vested in the same owner and he had deliberately obstructed the way by buildings at each end and had fenced off lot 4 from all access to the lane, and this was the state of things when Dawson purchased, and he acquiesced in that state of things, as did his successors in title, until the plaintiff purchased in 1891. It is difficult under such circumstances to understand how the plaintiff can claim any right to the easement as a purchaser in reliance on the plan. The evidence was conclusive that the defendant had deliberately revoked his intention of granting this easement over lot 4. The only persons who could then complain were the owners of lots 2 and 3. Dawson accepted his conveyance of lot 5 with the knowledge that the lane was obstructed, and he and those claiming under him for about twenty years acquiesced in that state of things. There was, therefore, no such easement in existence when the plaintiff purchased.

Although I place my judgment on this ground I do not wish to be understood as deciding that the Statute of Limitations might not have been a complete bar.

Without expressing any decided opinion I incline to the view that the dissenting judgment of Armour, C.J., in *Mykel* v. *Doyle*, 45 U. C. R. 65, was correct.

For the reasons I have given I think the judgment below must be reversed.

Judgment. OSLER, J. A.:—

OSLER, J.A.

The judgment of the trial Judge ought, in my opinion, to be reversed, so far as it is appealed from, viz., in declaring the plaintiff entitled to the right of way claimed by him over the lane described in the pleadings and restraining the defendant from obstructing the same. The effect of this will be to strike out paragraphs one and two of the judgment, as settled, leaving the recovery in respect of the other cause of action undisturbed. The case turns upon the question whether the easement or right of way had not been abandoned or lost by nonuser when the plaintiff acquired the land in respect of which he asserts it. It appears that in 1868 the defendant was the owner of a parcel of land which had been laid out into five building lots, to the rear of each of which the lane in question would give access, as shewn upon the registered plan, in accordance with which the lots were sold. Lots Nos. 2 and 3 were sold by the defendant in 1868, and lot 5 to Dawson, through whom the plaintiff claims, in 1871. The lane was never actually laid out upon the ground or opened or used by the purchasers of lots 2 and 3, the defendant, or Dawson or his successors in title down to the plaintiff, who purchased 27th November, 1891. "Mere nonuser of a privilege or easement of this description, is not, in itself, an abandonment that concludes the claimant; but the nonuser is evidence with reference to abandonment. The question of abandonment is a question of fact that must be determined upon the whole of the circumstances of the case. * * It has been always held to be of considerable importance, that a person in possession of a certain right, and leaving the right wholly unused for a long period of time, and having given so far an encouragement to others to lay out their money, on the assumption of that right not being used, should not be allowed at any period of time to resume his former right, to the damage and injury of those who themselves have acquired a right of user, which the recurrence to this long disused

easement will interfere with." Wood, V.-C.: *Crossley* v. *Lightowler*, L. R. 3 Eq. 279, at p. 292; affirmed L. R. 2 Ch. 478; *Stokoe* v. *Singers*, 8 E. & B. 31. What was said in the above case was in immediate reference to an easement of light, but the principle equally applies to that of a right of way: *Cook* v. *Mayor of Bath*, L. R. 6 Eq. 177.

Judgment.

OSLER, J.A.

In the case at bar it appears that in the year 1880, during the occupation of lot No. 5 by Lamb, one of the plaintiff's predecessors in title, the defendant erected a stable extending across the south or west end of the lane at the rear of lot 4, coming almost up to the line between lots 4 and 5, and in such a way as completely to obstruct ingress and egress to and from the latter over the lane, which, as I have said, had not been made use of by any one up to that time. So far as the lane was concerned the stable may be said to have taken the place of an ice house which the defendant then pulled down, and which had in like manner obstructed the lane for many years previously. After this, and in the year 1884, when one Campbell, another of the plaintiff's predecessors in title, was in occupation of lot 5, and had built a brick house thereon adjoining lot 4, the defendant built a row of shops on Queen street, completely across the other end of the lane, in both cases without objection by the then owner of lot 5. This was the condition of things when the plaintiff, in 1891, became the owner of it. We have, therefore, a continuous nonuser and nonclaim of the right followed by or accompanied with a continuous adverse obstruction, which appears to me to bring the case completely within the principle of the decisions I have referred to, and to establish the intention of the owner of lot 4 to abandon any right of way which, under the conveyance to Dawson, might be thought to have been acquired or to have existed over the lane. To permit the plaintiff now to assert it would be the height of injustice, and for these reasons I think the judgment, so far as it has been appealed from, should be reversed and judgment entered for the defendant.

Judgment.

OSLER, J.A.

As to costs, the defendant should have the costs of the appeal. The plaintiff having succeeded as to one substantial cause of action should, under the circumstances, have the general costs of the cause, and the defendant the whole of the costs relating to the issue in respect of the lane, in which he has succeeded. On points not argued before us or not necessary to be decided in the view I have taken of the case I express no opinion.

HAGARTY, C. J. O.:—

I am of the same opinion.

MACLENNAN, J. A.:—

[The learned Judge stated the facts as above set out and continued.]

I am of opinion that the general words of the conveyance did not confer on the grantee the use of this lane. The case is not like *Watts* v. *Kelson*, L. R. 6 Ch. 166, which was the case of a watercourse passing from other land of the grantor to the land granted, and which was regarded as a continuous easement, and was therefore held to pass by the general words in the deed. Nor is it like *Kay* v. *Oxley*, L. R. 10 Q. B. 360, the case of a hayloft with windows for the reception of hay opening over a private way of the grantor, the use of which was held to pass by the conveyance by the general words there used, there being no other means of getting to the hayloft windows. Here the lot conveyed had a frontage upon a public street, and the use of the lane was not necessary for purposes of access. There is a case of *Espley* v. *Wilkes*, L. R. 7 Ex. 298, in which it was held that when land granted was described as bounded on the east and north by "newly made streets" and a plan was endorsed which shewed those "new streets," the grantor was estopped by his deed from denying that there were streets or ways in the places indicated on the deeds which the grantee was entitled to use as such.

Judgment.

MACLENNAN, J.A.

In that case there was a covenant by the lessee to build upon the land, and there was no other access to it than by the streets referred to; but the decision was rested, as one of its grounds, upon the statement in the deed that the land demised abutted upon newly made streets. The deed itself was in effect a declaration that for the purpose of the parcel conveyed the adjacent parcels were streets. In the present case there is no reference at all in the deed to the lane. The description is lot 5 on Queen street, according to a plan, etc. The plan was not prepared for the purpose of this conveyance. It had been made and registered three years before by a former owner; and the Registry Act then in force, 31 Vict. ch. 20, sec. 75, made it obligatory in order to enable the deed to be registered, that it should conform to the plan. Some reference to the plan, therefore, could not be avoided, and I think that reference does no more than to ascertain the identity, and to define the situation of the parcel with its metes and bounds, and cannot be regarded as an averment that the lane was then, contrary to the fact, a lane or way appurtenant thereto. The authorities as to the effect of a reference to a plan in a grant of land are collected by the learned Chief Justice in his judgment in *Carey* v. *Toronto*, 11 A. R. 416; and I think they completely establish the conclusion which I have stated.

I refer also to the same case in the Supreme Court, 14 S. C. R. 173, and particularly to the judgment of Gwynne, J., at p. 192; also to *In re Morton and St. Thomas*, 6 A. R. 323. I therefore think that neither by reason of the reference to the plan, nor of the general words of the deed, did the easement in question pass to the grantee. Nor is there any hardship to the plaintiff in this conclusion, for having regard to the condition of the lane at and before the time of the sale and conveyance, closed as it was by a fence, and obstructed to its full width by a building, while the lot conveyed had a frontage on Queen street, it is impossible to believe that the defendant intended to sell or convey, or that Dawson intended or expected to acquire, a right of way over this lane.

Judgment.

MACLENNAN, J.A.

The absence of such intention or expectation is further put beyond all doubt by the want of all evidence of any claim or complaint by Dawson, or those claiming under him, from the time of the conveyance down to the commencement of this action, or evidence of objection when the ice house was removed and the stable was erected on its site, or when the other buildings were erected upon the lane some years later.

On the other hand, there is great hardship to the defendant, for the judgment of which he complains, involves the immediate removal of the buildings which he erected evidently in good faith many years ago.

The appeal was also supported upon another ground, which I think is also entitled to prevail. If one assume that the effect of the deed was to grant the easement contended for, it was obstructed from the moment of its creation, and has been obstructed effectually and continuously ever since with the acquiescence of the plaintiff and those under whom he derives his title for a period altogether of twenty-three years. The appellant contended that the effect of that was an abandonment, which was a bar to the action. He cited in support of his contentions: *Stokoe* v. *Singers*, 8 E. & B. 31; *Crossly* v. *Lightowler*, L. R. 3 Eq. 279 at p. 293; *Cook* v. *Mayor of Bath*, L. R. 6 Eq. 177; *Drewett* v. *Sheard*, 7 C. & P. 465.

These cases were distinguished by counsel for the respondent, because they were cases of acts done by the owner of the dominant tenement indicative of abandonment. The doctrine of abandonment or presumed release of an easement, is, however, not confined to such cases. It may be presumed from acquiescence in acts done by the owner of the servient tenement. *Regina* v. *Chorley*, 12 Q. B. 515, was an indictment for obstructing a narrow footway, by driving a cart upon it, which left no space for foot passengers to pass. The defendant was admitted to have had a carriage way there at one time, and the question was, whether that had been released or abandoned. The prosecutor contended that the defendant's right must be taken

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MACLENNAN, J.A.

to have come to an end by the public user and obstruction inconsistent with the defendant's easement. The learned Judge told the jury that no interruption by the public for a shorter period than twenty years would destroy the right.

In reference to this, Denman, C. J., delivering the judgment of the Queen's Bench, said: "If this were laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury, as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material. If, on the other hand, the learned Judge had done no more than remark that, if a mere ceasing to use the private way, or a mere acquiescence in the interruption by the public were relied on, it would be prudent in them not to rely on such mere cesser or acquiescence unless shewn for twenty years, we think such a remark could not have been quarrelled with, and certainly would have been no misdirection." Farther on he says: "It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury."

This case seems to be a distinct authority, that nonuser with acquiescence in acts done by the owner of the servient tenement, inconsistent with the easement, will suffice to raise the presumption of abandonment or release without any acts of the dominant owner himself. It also shews that such a presumption may be made after a shorter period than twenty years.

In *Crossley* v. *Lightowler*, L. R. 2 Ch. 478, in appeal, Lord Chelmsford said (p. 482): "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period

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MACLENNAN, J.A.

that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case."

The whole subject is discussed, and the authorities cited, in Gale's Law of Easements, 6th ed., pp. 541 to 547; and among other cases cited is *Harvie* v. *Rogers*, 3 Bli. N. S. 447, in the House of Lords, in which Lord Eldon said, speaking of a right of way (p. 447): "If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in." Now here were not only the fence and the ice house when the conveyance was made, but the ice house pulled down fifteen years ago and a stable erected on its site; and the Queen street entrance built upon eight or nine years ago, all evidently with the knowledge of the successive owners of lot 5, and all without any complaint, remonstrance, or objection. I think that is such obstruction and such acquiescence as, upon the authorities, amount to an abandonment of this right of way if it ever existed.

I, therefore, think the appeal should be allowed, and that the action as to that part of the case should be dismissed.

Appeal allowed.

CONFEDERATION LIFE ASSOCIATION v. KINNEAR.

Infant—Representation as to Age—Mortgage by Infant—Husband and Wife—Mortgage by Infant Married Woman—R. S. O. ch. 134, sec. 6.

To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation.

Section 6 of R. S. O. ch. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment.

Judgment of FALCONBRIDGE, J., reversed.

Statement.

THIS was an appeal by the defendant from the judgment of FALCONBRIDGE, J.

The action was brought for foreclosure of a mortgage upon certain property on Charles street, in the city of Toronto. When the mortgage was executed the defendant was about eighteen years of age and had been married about two months. The loan was effected by the defendant's husband under the circumstances fully set out in the judgments, and there was no representation by the defendant herself as to her age.

The action was tried at Toronto before FALCONBRIDGE, J., who, on the 16th of November, 1895, gave judgment in the plaintiffs' favour.

The defendants appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 1st, 2nd, and 4th of April, 1896.

S. H. Blake, Q.C., and *W. H. Blake*, for the appellant. There is no evidence here of any misrepresentation by the defendant as to her age. Mere silence is not enough, and the execution of the instrument does not carry the matter any further. If it did the defence of infancy could never be successfully raised. There must be some actual misrepresentation: *Stikeman* v. *Dawson*, 1 DeG. & Sm. 90; *Miller* v. *Blankley*, 38 L. T. N. S. 527; *Ex parte Jones*, 18 Ch. D. 109; *Martin* v. *Gale*, 4 Ch. D. 428. *Foley* v. *Canada Permanent Loan and Savings Co.*, 4 O. R. 38,

Argument.

will be relied on by the respondents, but that case turned on ratification, and besides the plaintiff was there asking equitable relief. So also *Leary* v. *Rose*, 10 Gr. 346, and *Re Shaver*, 3 Ch. Ch. 379, were decided on the ground of acquiescence and ratification. Here the defendant repudiated the transaction at the earliest possible moment and the plaintiffs cannot after the repudiation enforce a lien against her property: *Hamilton* v. *Vaughan, etc., Co.*, [1894] 3 Ch. 589; *Clements* v. *London and North-Western R. W. Co.*, [1894] 2 Q. B. 482.

Moss, Q.C., and *A. J. Russell-Snow*, for the respondents. The plaintiffs do not dispute the principle that there must be something amounting to a representation as to age to make the infant responsible, and the cases cited on behalf of the appellant are really, therefore, not of any direct application, for in this case the evidence is clear that there was connivance on the part of the appellant in the scheme to defraud the plaintiffs. This is very different from the case of a mere purchase of goods. Here there is the deliberate and solemn act of executing the mortgage and the duty was imposed upon the appellant of disclosing the fact as to her age, and not having done so she has been guilty of fraud: *Savage* v. *Foster*, 2 W. & T. L. C., 6th ed., p. 678; *Sharpe* v. *Foy*, L. R. 4 Ch. 35; *In re Howarth*, L. R. 8 Ch. 415; *Duncan* v. *Dixon*, 44 Ch. D. 211; *Ferguson* v. *Bobo*, 54 Miss. 121; *Beckett* v. *Cordley*, 1 Bro. C. C. 353. The appellant being a married woman at the time the mortgage was executed cannot, however, avail herself of the defence of infancy. By R. S. O. ch. 134, sec. 6, the deed of a married woman is made valid and binding whether she is of full age or not. Under the third section a married woman of full age can convey without her husband's concurrence, while under section 6 with his concurrence, she can convey notwithstanding her minority. The amendment made in 1894, 57 Vict. ch. 41 (O.), emphasizes this and the distinction between the two sections must be given effect to: see *Beckford* v. *Wade*, 17 Ves. at p. 91.

S. H. Blake, Q. C., in reply. Section 6 of R. S. O. ch.

134, does not apply. It simply does away with the disability of coverture: *Whalls* v. *Learn*, 15 O. R. 481. If it does away with the disability of infancy it also does away with any other disability, so that the deed of an insane married woman, joined in by her husband, would be valid, and this shews the absurdity of the contention. Argument.

May 12th, 1896. HAGARTY, C. J. O.:—

The learned trial Judge, while finding adversely to the defendant, finds that though she did not make any false assertion as to her age "she was guilty of at least a legal and technical fraud which her husband instigated and participated in, and he was, therefore, her agent when he assured Mr. Hamilton on the 5th of September, that she was of age;" that she knew she was mortgaging the property, etc.

The appellant relies strongly on the fact of her not making any false assertion as to her age; and also insists that finding her guilty of a legal and technical fraud, is not sufficient, nor does it amount to a moral fraud; that legally and technically every infant contracting or obtaining credit may be said to commit a legal fraud by concealing the non-age, yet is not, therefore, debarred from urging the defence of infancy; that the plaintiffs were bound to prove either a direct fraudulent representation as to her age, or some positive affirmative act intended to deceive on that subject; that she was the victim of a conspiracy; knew nothing of business; had no independent advice; that a wrong was done to her by her husband, for his own gain; and that she derived no benefit from it; and in no way instigated the proceeding; that all the money went to him, he having abandoned her almost immediately after; having left the country, and having never since been heard of; that she was ignorant of the nature of the transaction; that she thought she was in some way giving security for her husband.

It seems to be clear that to form an equitable defence to

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HAGARTY, C.J.O.

the plea of infancy, which could not avail at law, there must be some actual misrepresentation by the infant as to his age.

Pollock on Contracts, 5th ed., p. 74, discusses the point. "When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity, which however in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it," citing *Bartlett* v. *Wells*, 1 B. & S. 836, where the subject is much considered as it stood at law before the Judicature Act. Pollock refers also to what he calls the "interesting judgment" of Knight-Bruce, V.-C., in *Stikeman* v. *Dawson*, 1 DeG. & Sm. 90, "where" he says, "it is decided that in order to establish this equitable liability it must be shewn that the infant actually represented himself to be of full age. * * And as there must be an actual false representation, so it has been more lately held that no claim for restitution can be sustained unless the representation actually misled the person to whom it was made."

In the case referred to, Knight-Bruce, V.-C., discusses the law very fully, and he refuses to hold that the non-communication of non-age by a minor was a fraud warranting the interference of the Court of Equity against the defence of infancy: that neither "upon principle or upon such authority as binds, independently of principle, the Court, it ought, in my judgment, to pronounce that a fraud has been committed by him in respect of which relief in equity should be now given against him."

That very learned Judge also says, at page 113, that where no false representation is made the minor is not, after his majority at least, answerable in equity for the contract or the consequences, or liable in equity to be compelled to restore the other to his original position.

He also refers to a case, *Jackson* v. *Hobhouse*, 2 Mer. 483, at p. 487, in which some observations of Lord Eldon may be worth perusing in the case before us. Under a settlement of the wife's property, there was a clause against her assign-

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HAGARTY, C.J.O.

ing or anticipating. It was urged that there was a fraudulent concealment of this proviso and the plaintiff had advanced money on assignment of the wife's interest. Her actual fraud was not proved; the Chancellor says: "But supposing the omission to be clearly the wife's personal fraud, the question has reference, not only to her interest, but to the intention of the author of the settlement; and it becomes a very material point to determine, whether the Court will suffer the fraud of the wife to give her a power of alienation against the intention of the settlor. I am strongly inclined to think that it never could have this effect. If it were to be so held, it would tend to induce husbands to compel their wives to join in a fraud, for the purpose of giving them such a power of alienation, since the wife may then, at any time, acquire that power by virtue of her own fraudulent act. In the cases referred to, of a married woman having a power, and of an infant, they are capable by law of conveying; the act of the latter being only voidable on his attaining full age."

The case is worthy of notice in considering this case in reference to the act done, viz., in attempting to alien the estate before the time appointed for its coming into possession on the wife attaining full age, and also in the view of the married infant being coerced by her husband.

Knight-Bruce, V.-C., also said that the application of the equitable rule as to binding the infant is a matter of much difficulty and delicacy.

In the second edition of Simpson on Infants, page 102, it is said: "It is not always easy to decide what amounts to fraud. There must be some active conduct on the part of the infant, as in all the cases quoted above; allowing another person to deal with him as if he were an adult, or doing acts which only an adult can properly do, is not sufficient," citing *Stikeman* v. *Dawson*, 1 De G. & Sm. 90.

In Eversley on Domestic Relations (1885), p. 812, the same view as to necessity of a direct representation is adopted, and it is said: "The mere fact of his entering into a transaction which must necessarily be invalid, unless entered into

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HAGARTY, C.J.O.

by an adult, is not such a fraud as entitles the other party to relief."

Jessel, M. R., says in *Ex parte Jones*, 18 Ch. D. 109, at p. 120: "An infant is capable of committing a fraud in equity just as he is capable of committing a crime, and may be made liable for it. But the authorities shew that there must be an express representation, and one which would naturally deceive the person to whom it is made." Baggallay, and Lush, L.JJ., adopt the same view, the latter adding: "According to the decisions the representation must, in order to create the liability, be an express representation." *Ex parte Unity Banking Association*, 3 De G. & J. 63, where there was an actual representation, was also referred to. In Leake on Contracts, 3rd ed., p. 470, the law is stated as above, and in Chitty on Contracts, 12th ed., p. 196, it is said that a representation by an infant as to age must be express.

As to American law we may refer to an elaborate summary thereof in a note by the editors of the American State Reports to the case of *Craig* v. *Van Bebber*, 18 Am. St. Rep. 569, at p. 635. It was held that an infant was not estopped from avoiding his contract from the mere fact of not disclosing his minority. As said by the Court in *Baker* v. *Stone*, 136 Mass. 405, this fact does not present the question whether a minor who has induced a person to accept a conveyance of land by false and fraudulent representation that he is of full age, may be estopped to disaffirm the contract. *Aliter*, where he does misrepresent. The case cited of *Bobo* v. *Ferguson*, 54 Miss. 121, states the law rather wider than the English law, that by direct participation, or by silence when called upon to speak, thus entrapping a party into purchasing his property from another, an infant may be estopped. But that was a case in which the infant (19 years old) had conveyed her property to her father to enable him to mortgage it for his own purposes and the land had by the father's contrivance been conveyed to the daughter to keep it from his creditors.

In the absence of any express statement as to age we have

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HAGARTY, C.J.O.

to consider the rest of the evidence. I must say that I have little confidence in the evidence of Minnie Nethercott. Mr. Hamilton is positive that the defendant fully understood that she was giving a mortgage, that he explained it fully, and that she knew she was mortgaging the Charles street property. Her uncle, Mr. Jewell, who was present and executed some papers connected with completing her title under the will of his deceased wife, seems to have heard nothing or was asked nothing as to his knowledge of her giving a mortgage. His veracity is not attacked, but both parties seem to consider his recollection confused.

Then the case stands thus, that she was conscious of the nature of her act, that is, giving a mortgage on property that she had been told was not to be hers for three or four years when she would be of age.

Her husband, it is sworn, told Hamilton that she was of full age. I can hardly see that—as the learned Judge held—he was her agent in so representing.

The ground work of her defence is that it was a conspiracy between her worthless husband and his brother to entrap her into executing papers by which he could get hold of a large sum of money—in other words, to rob her of her estate for his individual benefit; that having confidence in him, she did whatever he told her—signed every paper presented to her, leaving everything to him.

Under the evidence, I am quite unable to find that what he said or told Mr. Hamilton can be accepted as equivalent to the express misrepresentation as to age required in the cases on this subject.

It would, I consider, be stretching the law to an unwarrantable length to hold that the false statement of the husband in the carrying out of such a scheme, should be held to be her statement made through him.

There ought to be some more evidence against her than is here disclosed to treat his falsehood as personally her falsehood.

If he had persuaded her that she was legally entitled to

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HAGARTY, C.J.O.

convey the land, this would not involve any authority given by her to him to tell the lenders that she was of full age. Her capacity to convey might have been suggested by the execution by her uncle of the papers under her aunt's will.

A wife of eighteen, hardly two months married, with full trust in her husband, could probably be not very difficult to satisfy on any such point. Almost in every case where the objection as to infancy is urged, there is a wrong, greater or less, intentionally or otherwise, done to the person dealt with. As Knight-Bruce, V.-C., says (*Stikeman* v. *Dawson*, 1 De G. & Sm. 90, at p. 111): "In these instances in which minors succeeded at law, could there have been interposition against them in equity? a jurisdiction, generally at least, equally considerate with courts of law in favour of infants. Fraud certainly is odious, and to be repressed; but neither is protection to be withheld from the imbecility of youth. Is not allowance to be made for its exposure and obnoxiousness to influence and temptation and seduction, especially in a state of legal non-age? Very young men may be defrauded into committing frauds."

Then he refers to *Jackson* v. *Hobhouse*, 2 Mer. 483, already cited, and says: "Lord Eldon, with reference to the case of a married woman (who may, we know, as well as an infant commit a fraud), glances at the possibility of a husband compelling his wife to join in a fraud; and may not some consideration be had for a boy hampered in the toils of a designing and experienced man of mature age?"

It seems clear that the fact of the infant having been open to large blame in her position and conduct in the transaction sought to be avoided, will not destroy the right to insist on the defence of infancy.

The defendant here is not now resorting (of her own motion) to a court of justice to lend its aid to recover an estate. She is resisting the execution of a foreclosure decree to dispossess her of an estate on the ground of non-payment of mortgage money which she has never received,

and which mortgage, she avers, was obtained from her, while an infant, by fraud of her husband.

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HAGARTY, C.J.O.

As has been said, she is using this defence as a shield, not as a sword.

I cannot accede to the plaintiffs' argument that our Legislature in R. S. O. ch. 134, sec. 6, has done more than dispense with the old process of acknowledgment by a married woman, of a deed executed jointly with her husband. It cannot have been intended to make an infant's deed good, or to shut out any defence, say of coercion, etc.

The subject is fully treated in the elaborate note already referred to in *Craig* v. *Van Bebber*, 18 Am. St. Rep. 569, at p. 584, citing Chancellor Walworth's judgment that the statute was not intended to validate the deed of an infant wife, referring to American Statutes *in pari materiâ*.

On the whole, I think we must allow this appeal. There does not appear to me to be sufficient proof against the appellant of such active, sentient, conscious fraud, as shewn in many of the numerous cases cited, as will debar her from her present defence against the plaintiffs' claim on her estate.

BURTON, J. A. :—

There is no doubt that a very gross fraud has been practised by the husband of this defendant upon the plaintiffs. The undisputed facts are that the husband unquestionably made a false representation to the plaintiffs that his wife, upon whose property he was proposing to raise money by mortgage, was of age, and, acting upon that representation, the plaintiffs accepted a mortgage from her which it is proved was fully explained to her.

In truth, the defendant was at the time about eighteen years of age, although much older in appearance, so that when the company's solicitor saw her there was nothing to induce him to doubt the correctness of the representation made to him by the husband and he was thrown off his guard, and he did not deem it necessary to make any

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enquiry of her as he most probably would have done had her appearance been more youthful. It is clear that no enquiry was made of her, and she states, apparently with great frankness, that she should have stated her age truly had any such question been put to her.

It is unnecessary to say how far she might have been bound had it been shewn that she was aware of any such representation having been made by her husband. An infant is no doubt capable of committing a fraud in equity as he is capable of committing a crime, and may be made liable for it, but the authorities, as I read them, seem to shew that there must be an express representation, and one which would naturally deceive the person to whom it is made.

There are circumstances in this case which are difficult to understand, notably the denial of the defendant that she was aware that she was executing a mortgage and that she was signing an order which enabled her husband to possess himself of the whole of the money borrowed, but when it is borne in mind that this was a young girl who had only lately left school, was married only a few weeks and had not yet discovered her husband's rascality, but confided fully in him, one ceases to feel that it is a matter to be wondered at that she was not at much trouble to enquire into the nature of the transactions she was entering into and how readily she may have been innocently induced to join in a fraud by a designing and experienced man of full age.

I may here say that the evidence of Miss Nethercott, given under commission, is so full of palpable misstatements that I decline to give credence to it, and without it the evidence tending to inculpate the defendant in her husband's fraud is very weak indeed. In the face also of the denial of the defendant that she was ever in Graham's office and the fact that the application is not signed by her, I think he is mistaken in identifying her as the party who accompanied her husband on the occasion he refers to.

I incline strongly to the opinion that the woman who

accompanied Kinnear to Graham's office on that occasion was Miss Nethercott, and that she conspired with him to carry out this transaction; she it was who sent to Mr. Arnoldi for the deed. It was handed to her, and two days afterwards it was in Graham's possession, received from Kinnear. How did it come into Kinnear's possession except with the connivance of Miss Nethercott, in whose hands it was only two days previously?

I acquit Mr. Jewell of all wrongdoing in this matter; he was suffering from illness and was very weak and his memory and reasoning faculties very defective. He was that day executing a deed which he believed he should not have executed if it had been present to his mind that the defendant was not of age. He says at first that he did not think about her age at the time the deeds were executed at all, then that he remarked to her: "Well, you are of right age, I suppose," to which she replied, "Yes, it is all right"; and then on examination he changes it into, "Have they asked you any questions about it, or something; I was doubtful about her age"; and contradicts his previous answer; adds, "I did not know at that time she was only eighteen," but if he had thought of it he would; and when further pressed as to what she meant by saying it was all right, he says, "What I had come for to sign," as if relying upon her as to its being right before signing, and she assured him it was all right, that Arthur had attended to everything.

This, in the face of her denial, is not, I think, sufficient to fix her with what would have been a gross fraud.

As to the question of privilege and the exclusion therefore of Mr. Arnoldi's evidence, I have not thought it necessary to refer to it, as even if Miss Nethercott's evidence is to be believed it would not, in my opinion, enable the plaintiffs to recover, it being clearly established that she made no misrepresentation as to her age. The defendant's version of what then occurred was that they went to consult him about getting some income from the property by procuring tenants, and this is, to a certain extent, borne

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BURTON, J.A.

out by the fact that he sent them to Mr. Whitney, who acts as agent for that kind of business, and got bills from him to put upon the premises.

I am by no means clear that the husband did not practise as gross a fraud upon his wife as he did upon the plaintiffs, and I think I am compelled under the authorities to hold that this mortgage cannot be enforced against her, and that the appeal must consequently be allowed.

OSLER, J. A. :—

I agree in the result, but with much reluctance, for I cannot but feel that the appellant is by no means free from blame in the matter. Still the authorities referred to make it impossible, in my opinion, to hold that the defence of infancy is not a bar.

MACLENNAN, J.A. :—

In considering this appeal, it is important to determine, in the first place, what weight is due to the evidence of Minnie Nethercott, taken upon commission; and I have come to the conclusion that, except to the extent to which she is corroborated by other evidence, no reliance whatever can be placed upon it. I think her evidence betrays a somewhat spiteful bias against the defendant, and is to an important degree inconsistent and contradictory one part with another. The two young women were cousins, and had been adopted in infancy and brought up together by Mrs. Jewell, their aunt. After Mrs. Jewell's death they still lived together, and continued to do so until about three weeks after the making of the mortgage in question, when Nethercott left Toronto and has never met her cousin since. She gives as a reason that after the mortgage was made the defendant turned round and ordered her out of the house. On the 17th of March, 1891, within six months after going away, she returned to Toronto and commenced an action against the defendant and the plain-

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tiff company, in which she claimed to be the owner of the land in question and to set aside the company's mortgage. That action was settled, so far as the present plaintiffs were concerned, by the payment to her of $175 or $200 and a release by her executed on the 18th of April. She then went to New York, where she has resided ever since, but her action as against the defendant was carried on to trial and was tried in November, 1891, and was dismissed. These circumstances may account for the animus against the defendant which is manifest throughout her evidence. In speaking of the conduct of the defendant and her husband after the mortgage was made her statements appear to me to be reckless and contradictory. She says they had no other means or source of revenue than the money raised by the mortgage ; and that seems to be quite true. She then goes on to say that they had a cottage at Long Branch in the summer where they lived in first class style, indulging in extravagance with champagne, entertainments, carriage and pair, driving from Long Branch to Toronto, and that this was all after the money was raised upon the mortgage. This extravagance she knew of, because she stayed with them herself at Long Branch for about ten days. Now, so far from the alleged Long Branch extravagance having occurred after the making of the mortgage, which was on the 9th of September, she herself has to acknowledge that the stay at Long Branch was in the end of July or beginning of August, long before the mortgage was ever thought of, and that the whole duration of their stay there was only three weeks. The marriage was on the 9th of July. They went to Long Branch about two weeks afterwards, and remained there about three weeks. It is proved otherwise that the house which they occupied at Long Branch was not a cottage of their own, but one which had been engaged by Mr. Jewell, and which he permitted them to occupy for a short time. There are other contradictions in her evidence, but, in my judgment, what I have referred to is sufficient to render it untrustworthy and worthless.

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MACLENNAN, J.A.

The question then to be decided is whether, putting Nethercott's evidence aside, it has been proved that the plaintiffs were induced to enter into this mortgage transaction by a representation, made by the defendant, or for which she is in law responsible, that she was of full age. The defendant was born in March, 1872, and was in her 19th year at the date of the mortgage; and she had been married just two months. She had the appearance of being of full age. Mr. Hamilton says she looked "several years older at any rate." Mrs. Jewell had died in 1888, and by her will made Nethercott trustee and guardian for the defendant during minority, with full control and care of her and her education. She had left school at fourteen. She could read and write, and had learned a little music. The will had been drawn by Nethercott who was eight years older than the defendant.

Then what was the defendant's personal connection with the mortgage? One of the title deeds of the property was a conveyance from the late Edward Fitzgerald to Mr. Jewell, and it was in the possession of Mr. Arnoldi, a solicitor. On the 2nd of September, the defendant went to Mr. Arnoldi's office, bearing a letter to him dated the previous day, signed by Nethercott, saying: "Would you kindly give my sister the deed of property; I would have called myself only that I am ill in bed, and oblige, yours truly. (Signed) MINNIE JEWELL."

Mr. Bristol, Mr. Arnoldi's partner, gave her the deed and took from her a receipt signed M. JEWELL.
L. KINNEAR.

The defendant says that Nethercott sent her for the deed; that she received it and gave it to her, and that she told her it was wanted about renting the house. I think this evidence is very significant. It shews that at the inception of the mortgage transaction, Nethercott, and not the defendant, was a principal actor; and that the defendant was employed by the elder woman as a mere messenger. Two days afterwards, on the 4th of September, that deed was in the possession of the husband, and he made applica-

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tion to one Graham for a loan upon the property of $5,000. The application was in writing, and was signed by him alone—was made on his own behalf, and there was no mention therein of his wife. It was addressed to H. Graham & Son, Loan and Estate Brokers. On the same day Mr. Graham filled up one of the plaintiff company's blank forms of application, also in the name of the defendant's husband, and on his own behalf, and delivered it to the company. The application on the company's form was not an original, but was compiled by Graham from the first, and was also in the husband's name alone in the first instance, the wife's name, as an applicant, having been inserted in pencil at some later time, but it does not appear when. The learned Judge has found that the defendant accompanied her husband to Graham's office, when the latter made application for the loan. That is the inference he draws from Graham's evidence. With great respect, I think that having regard to Graham's admission, that he had never seen her before or after until the time of giving his evidence, a period of nearly four years, and the doubtful way in which in the first instance he expressed his belief in her identity, taken in connection with the defendant's denial and the other circumstances, that inference is unwarranted. I think that, having regard to the undoubted fact that Nethercott had sent for the deed, using the defendant as a mere messenger; and the further fact that the two women resembled each other, and were often mistaken for each other; it is more probable that it was Nethercott who accompanied the defendant's husband to Graham's office. If that is so, the only connection the defendant had with the making of the mortgage, was what occurred in Mr. Hamilton's office on the occasion when it was executed by her husband and herself.

The applications prepared by Graham, were laid before the plaintiff's solicitor, Mr. Hamilton, on the same day, and the will and the deed which had been procured from Mr. Arnoldi, were placed in his hands. These he examined, and on the following day, had an interview with Kinnear,

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MACLENNAN, J.A.

the husband, in the course of which the latter assured him that the defendant was of age. Mr. Hamilton then took steps to procure land probate of Mrs. Jewell's will to be issued to Mr. Jewell, to prepare a conveyance from Jewell to the defendant, and the mortgage to the company ; and every thing being ready, the parties all met in Mr. Hamilton's office on the 8th, when the papers were signed. They are all dated on the 9th ; but Mr. Hamilton says they were executed on the 8th, and that appears to be the fact, as the affidavit proving the Jewell conveyance is sworn on the 8th. That was the only occasion on which Mr. Hamilton saw the defendant. He says the parties were in the office from 30 to 40 or 50 minutes ; that the husband went out for a few minutes, during which the defendant was there alone ; that he explained the matter to her fully ; that she knew that she was mortgaging the Charles street property ; and without doubt knew what she was about. The mortgage was executed in duplicate, Mr. Hamilton being the witness, and the affidavit of execution contains the statement that the parties were husband and wife ; that he knew them, and was satisfied that they were of the full age of twenty-one years. At the same time as the signing of the mortgage at the request of the husband, Mr. Hamilton drew and the defendant signed a paper authorizing the company to make the cheque for the loan payable to her husband.

The mortgage was registered on the 10th, the cheque was made payable to the order of the husband, and the money was drawn by him from the bank the same day. The mortgage is a joint mortgage, by both the defendant and her husband, and the covenants for payment, title, etc., are all joint and several. That a gross fraud was perpetrated by the defendant's husband is clear. It is proved that he knew perfectly that his wife was not of age. Yet he assured Mr. Hamilton that she was. Mr. Hamilton was completely deceived, for unfortunately he omitted to ask the defendant herself whether she was of age. It is only what might be expected that the husband quickly

spent the money he had thus obtained, and a few months afterwards deserted his wife.

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MACLENNAN, J.A.

The learned Judge has found that the defendant was guilty of fraud, that her husband instigated her to the commission of it, and participated in it. No doubt the husband did instigate his wife to make the mortgage. She admits that he pressed her to become security for him, and that, although unwillingly, she finally yielded and agreed to do so, and that she signed the mortage at his request. But the signing of the mortgage was not in itself such fraud as an infant is responsible for. The husband not only refrained from informing Mr. Hamilton that his wife was not of age, but actually told him that she was, well knowing that she was not. That was the fraud which was committed, and the question is whether the wife had any part in it, or if not whether she can for any reason be held responsible for it. Now I am unable to see any evidence whatever that the defendant participated in the fraud. In *Watts* v. *Creswell*, 9 Vin. Abr. 415, and 2 Eq. Cas. Abr. 515, which is always referred to in cases of this sort, Cowper, C., said: "If an infant is old and cunning enough to contrive and carry on a fraud, he ought in equity to make satisfaction for it." That was a case in which an infant very nearly of age, solicited a loan for his father on property of which the father was only tenant for life, and he himself was seized in remainder. He produced to the lender a forged deed, and was principally concerned all along in the fraud. He omitted to disclose his age or his own title to the property, and he witnessed the execution of the mortgage. The learned Chancellor said he did not think the mere being a witness to the deed would bind him, because if he had been made a party and had sealed it, yet that would not bind him. The fraud in that case was that the defendant had concealed his own title as tenant in remainder in fee and had induced the plaintiff to lend money on mortgage to his father who was only tenant for life, in the belief that the father was seized in fee. That case shews that although

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MACLENNAN, J.A.

an infant like an adult must in equity make satisfaction for fraud, yet the mere witnessing a deed, or even executing, it is not in itself such a representation of full age as will make him answerable. The same proposition is affirmed in the elaborate judgment of Knight-Bruce, V.-C., in *Stikeman* v. *Dawson*, 1 DeG. & S. 90, in which he reviews all the previous decisions on the subject. So strong is the protection of infancy that with a few well-known exceptions there is no remedy whatever at law upon the deeds or contracts of an infant unless ratified after full age, even though they were induced by the express representation of the infant that he was no longer an infant: *Bartlett* v. *Wells*, 1 B. & S. 836.

It is only in a Court of Equity that any relief can be had; and it is now settled that it is only where a person has been induced to contract with an infant in the belief that he was of full age, such belief having been induced by an express representation to that effect by the infant, that relief will be granted. The implied representation arising from the making of a contract or the execution of a deed will not do. As was said in *Johnson* v. *Pye*, 9 Vin. Abr. 396, otherwise "all the pleas of infancy would be taken away, for such affirmations are in every contract."

In *Ex parte Jones*, 18 Ch. D. 109, the nature of the representation by an infant which would make him responsible as for a fraud was considered. That was an appeal from a decision of the Chief Judge in Bankruptcy, making an adjudication of bankruptcy against a trader who was within a few months of his majority, on the application of a creditor who had supplied him with goods in the way of his trade. There had been no express representation by the infant that he was of full age, but it was contended that by engaging in business and making purchases in connection therewith, he, by his acts, held out to the world that he was of full age and was, therefore, liable in equity. The Court of Appeal reversed the order of the Chief Justice, and at page 120, Jessel, M.R., says: "An infant is capable of committing a fraud in equity just as he is

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capable of committing a crime and may be made liable for it. But the authorities shew that there must be an express representation and one which would naturally deceive the person to whom it is made;" and he cites a judgment of the Court of Appeal by Knight-Bruce, L.J., in *Ex parte Unity Banking Association*, 3 DeG. & J. 63, founded on the fact that express representations were made by the infant.

Farther on he says: "But it is said that the mere fact of his having obtained the goods is enough to make him liable to the respondents. If that were so it would destroy the whole of the law on the subject and the protection afforded by it to infants." In the same case Lush, L.J., says, page 125: "According to the decisions the representation must, in order to create liability, be an express representation." Now, in the present case the defendant made no express representation whatever. It was her husband who did that, and it is not shewn that she authorized him to do so, or knew that he had done so, or that she knew that Mr. Hamilton was ignorant of the truth. The misrepresentation of her age was the fraud, and the only fraud in the case, and, in my judgment there is not a particle of evidence that she authorized it or was even aware that it had been committed. Even if she had been told by Mr. Arnoldi in the interview in May that she could not borrow money on the land on account of her being under age, it does not follow that it ever crossed her mind that Mr. Hamilton was ignorant of her true age. When she was brought to the office to sign the deeds she found her husband and Jewell there, who both well knew her age, and I think it would not, or, at all events, might not, occur to her that these two persons and the lawyer did not know what they were about, or that her age could be a matter of any importance. Since the interview with Mr. Arnoldi she had been married, and a deed was being got from Jewell, and she might well suppose that the lawyer and the other parties no longer saw any difficulty in the way of money being raised upon mortgage. The

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MACLENNAN, J.A.

result is that, in my opinion, there is no evidence to connect the defendant in any way with the fraudulent representation of her age which was made by her husband,* and that her appeal from the judgment of my brother Falconbridge should be allowed.

Appeal allowed.†

PIERCE

v.

CANADA PERMANENT LOAN AND SAVINGS COMPANY.

Mortgage—Building Loan—Subsequent Mortgage—Priority of Advances on First Mortgage.

THIS was an appeal by the plaintiff from the judgment of the Chancery Division, reported 25 O. R. 671, reversing the judgment of FERGUSON, J., reported 24 O. R. 426, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., and STREET, J., on the 4th of December, 1895.

George Bell, for the appellant.

S. H. Blake, Q. C., and *Beverley Jones*, for the Canada Permanent Loan and Savings Company.

H. E. Caston, for Parsons.

May 12th, 1896. The appeal was dismissed with costs, Maclennan, J. A., dissenting, the reasons for judgment of the majority of the Court being substantially the same as those reported below.

See now 57 Vict. ch. 34 (O.).

* NOTE.—FALCONBRIDGE, J., said in his judgment: "I find that the defendant knew she was mortgaging this property. I adopt the evidence of Mr. Hamilton as to what took place in his office. It seems that there must be some active conduct on the part of the infant—allowing another person to deal with him as if he were an adult, or doing an act which only an adult can properly do is not sufficient: Simpson, 2nd ed., p. 102; *Watts* v. *Creswell*, 2 Eq. Ca. Abr. 515; *Stikeman* v. *Dawson*, 1 DeG. & Sm. 90. I hold upon all the facts that the defendant has been guilty of at least a legal and technical fraud, which her husband instigated and participated in, and that he was her agent, when he assured Mr. Hamilton that she was of age."

† The plaintiffs appealed from the Court of Appeal to the Supreme Court; but before argument the case was settled.

FARWELL V. JAMESON.

Landlord and Tenant—Distress—Goods of Stranger—Person in Possession "Under or With the Assent of" the Tenant—R. S. O. ch. 143, sec. 28, sub-sec. 3.

The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages :—

Held, per HAGARTY, C. J. O., and OSLER, J. A., that notwithstanding the tenants' repudiation of the agent's authority the plaintiffs were in possession "under" the tenants, within the meaning of sub-sec. 3 of R. S. O. ch. 143, sec. 28, and the distress was lawful.

Per BURTON, and MACLENNAN, JJ.A., that the right of distress is limited to cases where some privity exists and the distress was unlawful.

In the result the judgment of the Queen's Bench Division, 27 O. R. 141, dismissing the action, was affirmed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 27 O. R. 141.

The defendant Jameson was the owner of certain premises on Queen street, in the city of Toronto, leased by him to one Armstrong, who assigned the lease to the London and Canadian Loan and Agency Company. The London and Canadian Loan and Agency Company had employed one Parsons as their agent to obtain a tenant for the premises in question. He had no authority to make a lease, but had authority only to obtain offers to lease the premises, the company reserving the right to grant a lease or not. Parsons, however, assumed the right to lease the premises to the plaintiffs, and made a lease in his own name to them ; they, however, at the time knowing that he was merely an agent for the company. They then moved into the premises, and on the 17th of April, 1895, the defendant distrained for $355.00 arrears of rent due under the head lease, seizing a number of pianos and organs belonging to the plaintiffs. These pianos and organs he afterwards sold, the plaintiffs before the sale giving notice of their claim and objecting to the sale. The London and Canadian Loan and Agency Company repudi-

Statement.

ated Parsons' action as soon as they heard of it, and refused to recognize the plaintiffs as their tenants.

This action was brought to recover damages for illegal distress, and it was agreed between the parties that in the event of the defendant being held liable, the damages should be assessed at $550.00.

The action was tried at Toronto, on the 8th of November, 1895, before ARMOUR, C. J., who, on the 11th of November, 1895, gave judgment dismissing the action, and this judgment was on the 29th of November, 1895, affirmed by the Divisional Court.

The plaintiffs appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 16th of March, 1896.

G. Kappele, and *J. Bicknell*, for the appellants. There was no privity between the plaintiffs and the London and Canadian Loan and Agency Company who repudiated the action of Parsons in making the lease. The plaintiffs, therefore, were strangers and trespassers, and the defendant had no right whatever to seize their goods. They certainly were not in possession of the premises "with the assent of" the company, and they cannot be said to have been in possession "under" the company, no chain of title being shewn.

G. H. Kilmer, and *W. H. Irving*, for the respondents. The construction of the Act contended for by the appellants would make the provision as to the right to distrain on the goods of persons in possession under the tenant of no avail. According to the appellants' view a person could not be in possession "under" the tenant without being in possession "with the assent of" the tenant, for there could not be a chain of title without assent. Clearly a distinction is intended by the Act, and it must be held that the plaintiffs, who believed themselves to be tenants of the company, were in possession "under" the company.

G. Kappele, in reply.

May 12th, 1896. HAGARTY, C. J. O. :— Judgment. HAGARTY, C.J.O.

I think that for the reasons given by my brother Osler, whose judgment I have had an opportunity of reading, this appeal should be dismissed.

BURTON, J. A. :—

The point for decision in this case is the construction to be placed on sub-section 3 of section 28 of the Landlord and Tenant Act, R. S. O. ch. 143.

The general intent of the section was to remove the injustice of the common law, which enabled a landlord to distrain the goods of a stranger, and to restrict his remedy to the goods of the tenant or person liable for the rent, or persons claiming through them in the manner pointed out in sub-section 1 of section 28, or certain relatives of the tenant living with him on the premises. That being the general intent, it seems to me that sub-section 3 should receive a strict construction in favour of the view that the goods found upon the premises should not be distrainable unless the owner was a sub-tenant or assign of the tenant; or unless his occupation was under or with the assent of the tenant. In other words, the right to distrain was intended to be confined to the tenant's goods or the goods of persons claiming through him; or of persons whose occupation was traceable to some privity with the tenant of which an assent would be sufficient evidence.

Here Parsons had no authority to lease the premises to the plaintiffs, and when it became known to the London and Canadian Company that the plaintiffs were in occupation, they repudiated his act.

The section in question provides that the word "tenant" shall include sub-tenant, which would not extend to the plaintiffs; and the question is reduced to whether they could be said to be in occupation under or with the assent of the tenant; it is quite clear that they were not in occupation "with the assent" of the tenant, and as Parsons was

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BURTON, J.A.

not authorized to put them into possession, I do not see how they can be said to be in occupation "under" the tenant.

The London and Canadian Company made no contract with these plaintiffs. The only contract was the memorandum of lease between Parsons and them, and the relation of landlord and tenant was exclusively between them. As to Parsons, the plaintiffs having entered under him, would have been estopped from disputing his title, but I think, with great respect, that it is a fallacy to suppose that they were estopped from denying the title of the London and Canadian Company, although that company could recover from them by shewing a possession immediately prior to their wrongful entry, without going into any further evidence of title.

The reason suggested by my brother Falconbridge for having less reluctance than he otherwise would have had in concurring in the judgment, furnishes to my mind a strong reason for coming to a different conclusion. He states as a reason that the plaintiffs have their remedy against those who ought to have paid the rent. Is not this a *petitio principii?* If they were in under the London and Canadian Company, they would, I suppose, be entitled to look to them for indemnity, *aliter*, if they did not come in under them, or with their assent.

I do not see under the evidence in this case that they could maintain any claim against that company. They might possibly have a claim against Parsons if he made a false representation of his authority, but there was no privity between them and the company, and they could not look to them for indemnity.

I think the appeal should be allowed. See *Holt* v. *Martin*, 51 Pa. St. 499.

OSLER, J. A.:—

I am of opinion that the judgment should be affirmed for the reasons given by Armour, C. J., at the trial, and Street, J., in the Divisional Court. Even if the plaintiffs

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OSLER, J.A.

can say that they were not in occupation of the premises with the assent of the London and Canadian Company, the assignees, so far as this case is concerned, of the original tenant, yet they cannot deny that they were so in occupation under the company, having been let into possession by a person professing to act for the company in so doing, though his authority was defective. The company might have ratified the act of their agent and confirmed the plaintiffs in possession as their tenants, nor was it until after the defendant had distrained and sold the plaintiffs' goods—the plaintiffs all the time asserting their occupation to be a rightful one—that the company disclaimed and repudiated their agent's authority.

The object of the modern legislation exempting goods in certain cases from distress by the landlord was not the protection of trespassers on the land or persons in wrongful occupation thereof.

The immediate object, speaking generally, was to protect the goods of persons other than the tenant, brought upon or being on the premises with the consent of the tenant, and so to prevent the goods of persons having no interest in the premises from being made liable to satisfy the rent. We should, in my opinion, fail to give due effect to the language of the Act, and should impose a grievous burden upon the landlord, were we to hold that when he finds a person in occupation of the demised premises who claims to hold under his tenant, his right to distrain is to depend upon the result of a dispute between them, or upon the refusal of the tenant to ratify a sub-demise which professed to be made by his authority. The Act makes use of the two expressions—"under or with the assent of the tenant." They do not necessarily mean the same thing, and to give effect to the plaintiffs' contention, we should have to obliterate one of them by saying that they do. If the tenants, *i.e.*, the original tenants, would have the right, even for the purpose of preventing the plaintiffs from denying their title in an action to recover the land, to say that the plaintiffs came in under them, I think the plain-

Judgment.

OSLER, J.A.

tiffs are tenants within the meaning of the Act, and that the head landlord is not deprived of the right to distrain upon their goods. Having taken possession as tenants, they have no right to complain, and cannot assert that they are in as mere trespassers in adverse occupation and possession to every one.

The appeal should be dismissed.

MACLENNAN, J. A.:—

The statute R. S. O. ch. 143, sec. 28, has changed the law of distress, and restricted the landlord's right to a seizure of the goods of the tenant, with certain exceptions not here material to be stated. He may seize the goods of the tenant, or person liable for the rent; and the word "tenant" is defined by sub-section 3 to extend to and include the sub-tenant, and the assigns of the tenant, and any person in actual occupation of the premises under or with the assent of the tenant. Here the plaintiffs were in occupation. They were not tenants or sub-tenants, but it is contended, and the Court below has decided, that they were in occupation under the tenant. The test which the learned Judges have applied is, whether under the circumstances the plaintiffs could, in an action of ejectment, put the loan company to proof of their title. I do not see why that should be regarded as a test in determining whether the plaintiffs were in under the loan company; it seems to be the same question in another form, but if it were, I think either the defendant Jameson or the loan company, would, in an action against them, have to prove title. If in such an action the plaintiffs admitted the authority of Parsons, the appellants (in that case defendants), would succeed or fail according to the terms of the agreement with Parsons. But if the plaintiffs denied the authority of Parsons, they would then have to shew their title, which they would do by proving their own possession immediately before it was given to the defendants by Parsons, and that Parsons had given it to

Judgment.

MACLENNAN, J.A.

them without authority. As I understand the law, it is only when a landlord sues his tenant for possession, admitting and proving the tenancy, that the latter is estopped from denying the plaintiff's title. The law is, that a tenant is not allowed to deny the title of his landlord; but if the plaintiff denies that he is landlord, how can he invoke the doctrine? He wants possession just because he repudiates the defendant's contention that he is a tenant. He treats the defendant as a trespasser, and he cannot say in the same breath that he came in as a trespasser and also as a tenant. Therefore, I think he could only be turned out just as any other trespasser would be turned out, and upon the same kind of evidence. *Doe dem. Johnson* v. *Baytup*, 3 A. & E. 188, decides that a licensee is within the doctrine to the same extent as a tenant, and cannot in ejectment dispute the title of his licensor; and it is evident that the same reason applies to the case of a licensee as to that of a tenant. In that case it was alleged and proved that the defendant got in by the license of the plaintiff's agent for a limited and authorized purpose, and remained in possession fraudulently. In the present case, the loan company deny the authority of Parsons to let the plaintiffs in, or that they were in with any authority or license from them. That being so, I am unable to perceive how it can be said that they were in under them.

I think the appeal should be allowed.

Appeal dismissed, the members of the Court being divided in opinion.

McPhillips v. London Mutual Fire Insurance Company.

Insurance—Fire Insurance—Assignment of Insurance before Loss.

The interest of the insured in a policy of insurance upon chattels may, before loss, be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels.

Judgment of Meredith, C.J., affirmed.

Statement. This was an appeal by the defendants from the judgment of Meredith, C.J.

The action was brought by the plaintiff as assignee of a policy of insurance issued by the defendants to one McNulty on the 27th of May, 1893, insuring him in the sum of $600.00 on his dwelling and $600.00 on the contents thereof. At the time of the issue of this policy the property in question was mortgaged to the plaintiff to secure the sum of $3,000.00 and the policy contained an endorsement making the loss payable to the plaintiff "as his interest may appear." McNulty, on the 29th of July, 1893, executed under seal the following assignment of the policy, endorsed thereon: "For value received I hereby transfer, assign and set over unto P. McPhillips, Esq., and I assign, all my right, title and interest in this policy of insurance and all benefit and advantage to be derived from the same in consideration of a certain loan from the said McPhillips to me by way of mortgage security and one dollar." Notice of this assignment was not given to the company. Subsequently McNulty gave the plaintiff a mortgage upon the chattels. The fire took place on the 1st of January, 1895, and there was a total loss on the buildings and a partial loss on the contents.

The action was tried at London on the 7th of January, 1896, before Meredith, C.J., who gave judgment in respect of the loss on the buildings for $600.00, and in respect of the loss on the chattels for $140.00.

Argument

The defendants appealed as to the judgment in so far as it was in the plaintiff's favour as to the chattels, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 26th of March, 1896.

E. R. Cameron, for the appellants. The learned Chief Justice was wrong in ruling that the plaintiff as assignee of the policy of insurance could maintain this action. It is admitted that the plaintiff had no interest in the chattels insured and therefore he cannot recover: *Griffey* v. *New York Central Ins. Co.*, 100 N. Y. 417. To allow such recovery would be a violation of the fundamental principles of fire insurance. If the policy can be transferred from hand to hand irrespective of any interest in the property insured how can the right of replacing the property be exercised? See Beach on Insurance, p. 585; Bunyon's Law of Fire Insurance, 4th ed., pp. 14, 256. The position is the same as if the plaintiff himself had insured the goods and as he had no insurable interest he could not in the event of loss recover. The doctrine of equitable assignment does not apply where the assignment takes place before the loss.

Aylesworth, Q.C., for the respondent. The defendants knew that McNulty was indebted to the plaintiff when they issued the policy and that the policy was to be held by him as security for his debt, and if they wished to protect themselves in respect of the loss on the chattels they should have restricted their liability. Apart from this the plaintiff as a *bonâ fide* assignee of the policy was entitled to enforce recovery.

E. R. Cameron, in reply.

May 12th, 1896. BURTON, J.A.:—

The amount involved in this appeal is small and the appeal itself is confined to the point of whether the learned trial Judge was right in holding that an assignee of a policy

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BURTON, J.A.

of insurance when the assignment was made without the knowledge or consent of the insurance company, and where such assignee has not vested in him any estate whatever in the chattels insured is entitled to recover the sum payable under the policy in case of loss.

In many policies there is an express provision that any assignment of the policy to a third person without the consent of the company shall avoid the policy; but I understood it to be conceded on the argument that there was no such provision in this contract so that the question as presented to us on the argument, was as to the effect of such an assignment under the circumstances referred to.

I am free to confess that I have always been under the impression that parties accepting such transfers as security were left very much at the mercy of the assurers, and in practice I never advised the acceptance of them, but I have never until now had occasion to consider their validity.

At the time the policy was effected the plaintiff held a mortgage on the house of the assured for a sum largely in excess of the sum assured upon it and there was a memorandum written on the face of the policy, or rather of the receipt, "Loss, if any, payable to McPhillips, mortgagee,as his interest may appear." This, though an appointment in favour of the mortgagee, was manifestly confined to his interest in the mortgaged premises.

But a few months afterwards the assured made a formal transfer of the policy which included an insurance upon the contents of the house.

I was at first inclined to think that this carried the case no further, and that the claim was confined to the sum recoverable in respect of the mortgage on the buildings, but a further examination has convinced me that that is not so, but that whatever is recoverable under the policy is assigned, the latter portion of the assignment being designed to shew the consideration for which it was made.

What then is the effect of such an assignment? When, as is sometimes to be found in the books, a fire policy is said to be unassignable even in equity without the consent

Judgment.

BURTON, J.A.

of the insurers, it must be taken to mean that the transfer which is prohibited is that of the entire ownership. The assignment in this case did not profess to vary in any respect the contract of insurance. It was, as has been held in several American cases, a mere appointment in favour of McPhillips to receive, and a direction to the insurers to pay to him, the loss when, if at all, it should occur.

The interest of McNulty in the property continued as before, but it was an appropriation beforehand to the payment of the plaintiff's debt of the money secured by the policy, should that loss ever become payable. I can see no valid objection to such an assignment. If instead of this formal assignment it had taken the shape of an order on the insurers to this effect—in the event of loss, pay the amount of such loss to McPhillips—what objection could there be to such an order? It simply converts one of the parties into a trustee for the other. It is only a contingent order or assignment of what may become due under the policy.

It is admitted that the plaintiff is a creditor of McNulty for an amount largely in excess of the sum claimed and a payment by the company to him so far as is disclosed in the evidence, would be a good discharge; it is true that the allegation contained in the statement of claim that the assignment was assented to by the company is not proved, but such an allegation was not essential to the right of the plaintiff to recover in my opinion. The defendants might if they thought it necessary have applied at the trial to have the assured made a party.

The appeal should, I think, be dismissed.

I refer to Bunyon's Law of Fire Insurance, 3rd ed., p. 16; Beach on Insurance, sec. 1122; *Griffey* v. *New York Central Ins. Co.*, 100 N. Y. 417; *Muhr* v. *Norwich Fire Insurance Society*, 23 Abb. N. C. 436; *Phillips* v. *Merrimack Mutual Fire Ins. Co.*, 10 Cush. 350; *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24; 52 Am. R. 248; *Parks* v. *Connecticut Fire Ins. Co.*, 26 Mo. Ap. 511, at p. 525; and May on Insurance, 2nd ed., sec. 377.

Judgment.

OSLER, J. A.

OSLER, J. A. :—

I think this appeal should be dismissed. It is based upon an entire misconception of the law applicable to the facts. The plaintiff was mortgagee of the land and buildings mentioned in the policy, a renewal of a previously existing policy. The renewal bears date the 31st of May, 1893, and is for a term of three years from the 27th of May, 1893. The plaintiff's mortgages bear date respectively the 3rd of August, 1892, and the 28th of January, 1893. By endorsement on the policy and application the loss is made payable to the plaintiff, "the mortgagee, as his interest may appear," the sum insured is $1,200 in all, in several amounts upon buildings and chattel property. Afterwards on the 29th of July, 1893, McNulty, the insured mortgagor by endorsement on the policy, assigned his "right, title and interest" and "all benefit and advantage to be derived therefrom" to the mortgagee in "consideration of a certain loan to him by McPhillips and of one dollar." The loan referred to was that secured by the mortgages already mentioned.

Later on, McPhillips became mortgagee of certain of the chattels insured by the policy, and so continued up to the time of the fire. The defendants contention is that their assent was necessary to the assignment of the 29th of July, 1893, and that as the plaintiff had no interest in the chattels at that date, there was a severance between the ownership and the policy, and so nothing passed by the assignment, and the policy as to the chattels came to an end.

The defendants compare this to the case where the insured has sold the property out and out, and has attempted by assignment or transfer, without the consent of the company, to attach or continue the risk to the goods in the hands of the new owner. That is what is referred to in the passage cited from *Griffey* v. *New York Central Ins. Co.*, 100 N. Y. 417, and in Bunyon's Law of Fire Insurance, 4th ed., pp. 14, 256; but there is not the least analogy between the two cases.

Judgment.

OSLER, J.A.

Here McNulty remained the owner of the goods insured. All he did was to assign his interest in the policy and the benefit and advantage he might derive therefrom in case of loss to the plaintiff as collateral security.

It was no more than an assignment of a chose in action to which no consent by the insurers was necessary. McNulty remained the insured, but he provided thereby that the loss, if it occurred, should be payable to some one else, who was in fact his own creditor. No case in our law was cited which forbids that to be done. The assent of the insurers is essential only where the policy is assigned to accompany a sale of the property insured, and a new contract of insurance is intended to arise between the purchaser and the insurance company: see *Fogg* v. *Middlesex Mutual Fire Ins. Co.* 10 Cush. 337; *Phillips* v. *Merrimack Mutual Fire Ins. Co.*, 10 Cush. 350, cited in *Mutual Life Ins. Co.*, v. *Allen*, 138 Mass. 24; *Rayner* v. *Preston*, 18 Ch. D. 1; *Castellain* v. *Preston*, 11 Q. B. D. 380. Subject to the chattel mortgage, McNulty was at the time of the fire both owner and insured. The assignment having been by way of security this action ought properly have been brought in his name, but as he has refused to become party plaintiff it is properly maintained in the name of the plaintiff as assignee: *Hammond* v. *Messenger*, 9 Sim., at p. 332, even if it is not to be held properly constituted on the principle acted on in *Mitchell* v. *City of London Assurance Company*, 15 A. R. 262, the loss having been made payable to the plaintiff and he having been in fact interested in the chattels as well as the buildings at the time of the loss.

I feel a satisfaction in saying that as against the objections taken the judgment should be affirmed.

HAGARTY, C.J.O., and MACLENNAN, J.A., concurred.

Appeal dismissed.

Flood v. Village of London West.

Negligence—Contributory Negligence—Negligence of Driver of Carriage—Injury to Occupant.

The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage.

Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence the former cannot recover.

Judgment of Meredith, C.J., affirmed.

Statement. This was an appeal by the plaintiff from the judgment of Meredith, C. J., and was argued before Hagarty, C.J.O., Burton, Osler, and Maclennan, JJ. A., on the 25th of March, 1896.

P. McPhillips, for the appellant.

E. R. Cameron, for the respondents.

May 12th, 1896. The judgment of the Court, in which the facts are stated, was delivered by

Osler, J. A.:—

This was an action to recover damages for an injury sustained by the plaintiff by reason of a road on which he was driving having been negligently left out of repair. The case was tried before Meredith, C. J., and a jury, at the London Winter Assizes, 1896.

The jury found that the road was out of repair, but that the plaintiff's own negligence and want of reasonable care in driving was the cause of the accident. Judgment was entered for the defendants, and the plaintiff now appeals.

The evidence shews that on the evening of the 28th of March, 1895, the plaintiff hired a conveyance and drove with three friends from the City hotel in London to Collins' hotel in London West. That point they were fortunate enough to reach in safety, passing without accident the obstruction in the road on which they were afterwards wrecked.

Judgment.

OSLER, J.A.

When going out, Knox, one of the plaintiff's friends, got into the driver's seat, but the plaintiff would not permit him to drive, saying that he was paying for the team, and would drive, or was responsible for them. Accordingly the plaintiff himself drove out. On their return, Knox got into the driver's seat again, without objection on the part of any one, and was driving when the accident happened. The plaintiff was asked: "Coming back, Knox was driving, was he? Yes. You relented a little and let Knox drive? No; Knox got into the driver's seat again. Why did not you tell him again that you were responsible for the rig and you would drive? I felt like doing so, but I thought I would not repeat it. Whom did you blame for the upset? I blamed Mr. Knox, and all I said was 'You would drive.'"

After the jury had retired, the plaintiff's counsel asked the Judge "whether a question should not be submitted to the jury as to whether Knox was the agent of the plaintiff?" The Judge refused to submit the question.

There is nothing else in the evidence or in the disposition of the case at the trial that calls for observation.

In his fourth reason of appeal the plaintiff says that as Knox was driving when the accident happened and Knox was not shewn to be his servant or agent, then, even if there was negligence in Knox, that the trial Judge should have told the jury (which he was requested, but refused, to do) that as Knox was neither servant nor agent of the plaintiff, they could not find contributory negligence by the plaintiff.

The learned counsel for the plaintiff contended that for the purpose of complaining of the defendants' negligence his client was in a better position than Knox—in other words, that he was not responsible for the latter's contributory negligence. He put the case as if the plaintiff had been a mere passenger in the vehicle, having no control over its management, and so not identified in respect of negligence with the driver, according to the decision in the recent case of *The Bernina*, 12 P. D. 58; *Mills* v.

Judgment.

OSLER, J.A.

Armstrong, 13 App. Cas. 1; overruling *Thorogood* v. *Bryan*, 8 C. B. 115.

Had there been any evidence in support of this contention, his objection to the charge of the learned Chief Justice, however feebly taken or pressed at the trial, might have succeeded. His difficulty is that there being no other evidence on the point than that which I have quoted, there was nothing on which the jury could have answered the question proposed in his favour.

Had the liveryman furnished the driver, as well as the horses and the carriage in which the plaintiff and his friends were, so that the driver was the servant not of the plaintiff but of the owner of the horses and carriage, a very different question would have arisen, and the plaintiff might well have been held not to be "identified" with the negligent driver in such a way as to prevent him from recovering the damages caused by the defendants' negligence. The evidence shews that the plaintiff was the hirer of the team and that he himself was the driver either by himself or by a person to whom he entrusted the actual driving or management. It was always within his control and direction. Knox was simply his deputy or agent, from whose hands he might have taken the reins whenever he pleased.

The proposition which covers the case is one of those stated by the Master of the Rolls in *The Bernina*, 12 P. D. 58, viz., that although the plaintiff may not have been himself personally guilty of negligence, yet his servant or agent, or the person to whom he entrusted the management of the conveyance, was guilty of negligence, which partly directly caused the accident, and therefore he cannot recover.

In *Stafford* v. *Oskaloosa*, 57 Iowa 748, a case singularly like the present, it was held that if the owner of a team while riding in it allows a companion to take the reins, the contributory negligence of such a driver is chargeable to the owner, because it is evident that the latter would at all times have the power to control the driver, who was therefore in fact and in law his agent.

I see no misdirection in the matter complained of but the contrary, and am therefore of opinion that the appeal should be dismissed. Many other grounds of appeal are set forth in the notice of appeal. On the evidence the finding of the jury could not fairly be interfered with, and none of the other grounds was pressed. Judgment. OSLER, J.A.

Appeal dismissed.

GRANT V. WEST.

Bankruptcy and Insolvency—Assignments and Preferences—Assignment for the Benefit of Creditors—Claim for Damages—Contestation of Claim—R. S. O. ch. 124.

A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Assignments and Preferences Act, R. S. O. ch. 124, and cannot, after the assignment, bring an action to ascertain the damages and rank for the amount against the estate in the hands of the assignee.

Per MEREDITH, J., at the trial.—A creditor is confined, in an action to establish his contested claim, to the quantum and items set out in the affidavit of claim filed with the assignee.

Proper form of judgment in an action establishing a right to rank on the estate of an insolvent explained.

THIS was an appeal by the plaintiffs and a cross-appeal by the defendants from the judgment of MEREDITH, J. Statement.

The defendants were the assignees for the benefit of creditors of one Harvey Morris, and the plaintiffs brought this action against them to establish their claim to rank upon the estate. In their affidavit of claim they stated that Morris was indebted to them in the sum of $7,728.93, for money paid by them for his use, for money paid to him, for work and services rendered by them to him, for money paid out and travelling and other expenses incurred under contracts for the sale and delivery of staves and hoops to them, for money paid for his use for demurrage, for services rendered to and for him under

Statement.

the contracts, "besides damages for breach thereof." Particulars were then given in the affidavit of certain drafts upon the defendant held by the plaintiffs. Notice of contestation of the claim was given by the defendants, and this action was thereupon brought claiming not only the amount above mentioned, but also large sums for damages in respect of inferior staves sold by Morris to the plaintiffs. The defendants at first denied all the allegations contained in the statement of claim and the plaintiffs' right to rank upon the estate, but subsequently admitted that the plaintiffs were entitled to rank upon the estate for $6,500, and amended their defence by an admission to that effect.

The action was tried at Chatham on the 11th of September, 1895, before MEREDITH, J. The objection was then taken by the defendants that the plaintiffs were confined to the affidavit of claim, and could not go into any questions not specifically set out in that affidavit, and were limited in this action by the amount mentioned in the affidavit of claim. This contention the learned Judge gave effect to, and after evidence had been given as to the items of damages referred to in the affidavit, judgment was given in favour of the plaintiffs, ordering and adjudging that "the plaintiffs do recover against the defendants the sum of $6,500, together with the costs of suit * * which said sum of $6,500 is to be levied on the estate, real and personal, of the said Harvey Morris at the time he became insolvent, and which has passed to the defendants as assignees for the benefit of creditors by them to be administered, and the costs * * aforesaid to be levied upon the proper goods and chattels of the said defendants," and directing a reference to the Master to take an account of the amount due to the plaintiffs in respect of certain of the items of damages referred to in the affidavit of claim, and dismissing the action as to another item of damages referred to in the affidavit of claim, together with all other claims for damages set up in the pleadings.

The appeal and cross-appeal were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 19th of March, 1896. Argument.

Atkinson, Q. C., for the appellants. The judgment is wrong in limiting the plaintiffs to the questions and amount stated in the affidavit of claim. Notice of contestation having been given, the plaintiffs were entitled to sue for, establish and recover the whole of the claims of every kind that they had against Morris, and to rank therefor as creditors on the estate. [The learned counsel then discussed the evidence as to the different items of damages in respect of which the action was brought.]

J. S. Fraser, for the respondents. The plaintiffs having filed an affidavit proving their claim at a certain sum, and not having filed any supplementary affidavit, cannot in any event obtain relief in this action beyond the amount mentioned in the affidavit. The learned Judge was wrong in directing a reference as to certain items of damages. It is clear on the evidence that there was no liability on the part of Morris for the damages claimed, and the only relief to which the plaintiffs are entitled is the right to rank for $6,500 as admitted by the defendants.

[HAGARTY, C. J. O.—The objection to the right to rank seems to me to be far deeper. There does not seem to be any provision in the Assignments Act allowing a person claiming damages to substantiate that claim against the estate.]

Atkinson, Q. C., in reply. That objection has never been raised. The word "claim" is frequently used in the Act, showing that something more than a debt strictly so-called is intended.

May 12th, 1896. HAGARTY, C. J. O.:—

This is an action brought under R. S. O. ch. 124, sec. 20, sub-sec. 5. The defendants are assignees of the estate of Harvey Morris, an insolvent. They contested a large portion of the claim made by the plaintiffs on the estate.

Judgment.

HAGARTY, C.J.O.

The assignees admit that the plaintiffs should prove on the estate for $6,500, and resist the residue of the claim consisting of damages claimed for breach of quality of goods sold to them by the insolvent.

He was a large dealer in lumber and staves, and made sales to the plaintiffs. They resold to other parties, who either rejected the goods as not answering the contract of sale which the plaintiffs had made on the alleged faith of the quality or description of the goods sold to them, or claim damages from the plaintiffs alleging that the goods were not merchantable, and the plaintiffs allege that they had to pay or allow to these vendees damages therefor, and they claim also for short deliveries and for loss of profit to themselves and for breach of contract as to quality, etc.

At the trial before Meredith, J., four of the claims for damages were referred to the Master to settle, and other claims were dismissed by him.

The plaintiffs appeal to this Court admitting that their complaint against the judgment at the trial amounts to about $600.

We have to consider whether these claims for damages are provable against the insolvent estate. We cannot refer to any of our repealed Bankrupt Acts under which the claims might possibly be admissible. We must take our Assignments Act and its amendments as they stand.

There is no specific direction in the Act as to the kind or class of claim which may be proved against the estate. The Act seems to provide for the case of a person or debtor in insolvent circumstances or unable to pay his debts in full, and provides for such a person making an assignment for the benefit of his "creditors." His assignee is vested with all his estate, rights, etc., vested or contingent, etc.

It gives certain powers to a majority in number and value of the creditors who prove claims to the amount of $100 or upwards.

The assignee is to find out the names, etc., of the debtor's creditors.

Judgment.

HAGARTY, C.J.O.

There are provisions as to a creditor voting on his "claim" to a certain amount in money; also as to a creditor holding a claim based upon negotiable instruments on which the debtor is only indirectly or secondarily liable.

Every person claiming to rank shall furnish particulars of his claim, etc., and he may be barred unless proof be furnished in a named time.

A person whose "claim" has not accrued due may prove under the assignment and vote, deducting interest for the unexpired time.

The law of set-off shall apply to all claims against the estate and to actions brought by the assignee for debts due to the assignor as if he were plaintiff.

In 1892, 55 Vict. ch. 25, (O.) enacts that where the word "creditor" occurs in the Act as amended in 1891, the same shall be deemed to include any surety and the indorser of any note or bill who would on payment thereof by him or of the debt, etc., in respect of which such suretyship was entered into or indorsement given become a creditor of the person giving the preference.

None of the Acts on this subject seem to throw any further light on the meaning of the terms "creditor" or "debtor."

I have examined the English Bankrupt Acts down to 6 Geo. IV. ch. 16, and can find nothing explanatory of these terms.

From our own Insolvent Acts I can gather no larger definition than can be given to the words. The legislation is as to a debtor, *i. e.*, in such circumstances that he cannot pay his debts. Creditors are the persons to whom he is indebted.

I cannot include under such words unascertained and unliquidated claims that may exist against him for damages on some alleged breach of contract. These may not be barred by any assignment he may make, but they are not his debts nor the persons claiming them creditors.

Down to 6 Geo. IV. ch. 16, debts payable on a contingency were not provable. It was attempted to make this apply to

Judgment.

HAGARTY, C.J.O.

demands for damages depending on a contingency, but it was held that there must not only be a debt or engagement to pay a definite sum, but also that the contingency on which it was payable should be reducible to a matter of calculation : Robson's Law of Bankruptcy, 7th ed., p. 273, *et seq.*

Damages were held not provable when the amount was uncertain notwithstanding a breach of contract or a right of action had arisen before the bankruptcy. Subsequent Acts have enlarged very much the right of proof, and apparently cover claims for unliquidated damages arising by reason of contract or promise : see the Acts of 1861 and 1869 ; Robson's Law of Bankruptcy, 7th ed., p. 276.

Our Canadian Insolvent Act, no longer in force, defined " creditor " to mean " every person to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety," and also provides for a creditor claiming on a contract depending on a condition or contingency. I refer to a summary of the law under the Insolvent Act by Sir William Richards in *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498.

Hammond v. *Toulmin*, 7 T. R. 612, and the authorities therein cited, shew very clearly the views taken of claims for damages prior to 6 Geo. IV., ch. 16.

Lord Kenyon says : " The Legislature only meant that those demands that were incurred before the bankruptcy, and which were liquidated debts, should be proved under the commission."

A creditor is often defined as " one to whom a debt is owing—correlative to debtor."

I think it is used in that sense in the Assignments Act.

The items referred to the Master must follow the rule laid down.

The appeal should be dismissed with costs.

The cross-appeal must be allowed without costs as to the items referred to the Master. The plaintiffs are to have costs down to the consent to proof to admitted amount. No costs to either party of the trial.

OSLER, J. A. :— Judgment.

OSLER, J.A.

The point taken by the learned Chief Justice on the argument is, in my opinion, fatal to the appeal.

The action is brought by the plaintiffs as creditors of Harvey Morris, an insolvent debtor, against his assignees for the benefit of his creditors under R. S. O. ch. 124, sec. 20 (5), and their claim in question on this appeal is for unliquidated damages arising out of alleged breaches of certain contracts between the plaintiffs and Morris which occurred previously to the assignment.

The question is whether a claim of this nature is a claim, and the claimants creditors, within the meaning of the Act, for which the latter are entitled to rank upon the estate assigned in the hands of the assignees.

The Act relates to the estate of a person in insolvent circumstances, or who is unable to pay his "debts" in full. He is spoken of throughout as the "debtor," and the person who claims upon the estate as the "creditor." The creditors are persons whose names and residences are by section 16 supposed to be ascertainable by reference to the debtor and his books of account—claimants in respect of commercial demands due or accruing due, whether the liability therefor is contested or not. A claim for damages is nowhere in terms mentioned in the Act. Wherever the claimant is referred to, the language seems to point to a claim against one who is a debtor, a word which does not aptly describe one who is only sought to be made liable for unliquidated damages. Sub-section 4 of section 20 appears to me to indicate more pointedly than any other that what is meant by a "claim" provable under the Act is a debt due or accruing due.

"A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for the time which has to run until the claim becomes due."

A claim for damages, the liability for which has not been

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OSLER, J.A.

adjudicated at the time of the assignment, and depends upon the result of an action, seems to be quite outside any reasonable construction of this language.

Other sections, relating to the right of creditors to vote, contestation and proof of claims, the nature of the action to establish the claim which the creditor is required to bring against the assignee, not against the assignor, all point in the same direction.

If a claim of this kind were provable it would be difficult to exclude claims for any kind of unliquidated damages which could be suggested.

In *Cockburn* v. *Sylvester*, 1 A. R. 471, an accommodation acceptor was held not to be a creditor of the person accommodated for the purpose of taking a valid warehouse receipt under C. S. C. ch. 54, sec. 86, and 24 Vict. ch. 23., the liability incurred by such party to indemnify the acceptor not constituting a debt until default made by him.

All arguments from analogy between our Act and Insolvent Acts are opposed to treating this claim, in the absence of any provision expressly making it so, as one provable against the estate. It is not a claim on a condition or contingency which would be provable within sec. 81 of the Insolvent Act of 1875; or secs. 177, 178 of the Imperial Bankruptcy Act of 1849. Under the Imperial Act of 1861, sec. 153, a demand in the nature of damages arising out of any contract or promise was expressly permitted to be ranked for when proved in the manner prescribed, and so also under the Bankruptcy Act of 1869, 32 & 33 Vict. ch. 71. *Burrowes* v. *DeBlaquiere*, 34 U. C. R. 498, may be referred to. There, a claim for damages for breach of covenant was held not to be barred by the defendant's discharge in insolvency, though he had scheduled the claim as one provable against his estate: *Jones* v. *Thompson*, 1 E. B. & E. 63. For these reasons I think the appeal should be dismissed.

It follows that the cross-appeal of the defendants as to the four items of damages referred by the Judge at the

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trial to the Master, should be allowed, as they are all claims of a precisely similar nature to that involved in the appeal.

The result is that the judgment at the trial should be varied by striking out the third, fourth and fifth paragraphs, and by inserting in lieu thereof a declaration that as to all the claims in the statement of claim other than that mentioned in the second paragraph of the judgment the plaintiffs are not entitled to rank or prove therefor upon the estate of the insolvent in the hands of the defendants as assignees.

The second paragraph of the judgment must also be varied, because it is not the proper form of judgment in an action of this nature.

It is thereby adjudged "that the plaintiffs do recover against the defendants $6,500 to be levied on the estate, real and personal, of the insolvent Harvey Morris, which had passed to the defendants as assignees for the benefit of creditors." In form therefore, it gives the plaintiffs a right to be paid that sum out of that estate by execution following the judgment. This is quite erroneous, because an action of this kind is brought merely for the purpose of establishing the right of the plaintiffs to rank as creditors upon the estate in the hands of the assignee. The proper order to make is that the Court doth declare and adjudge that the plaintiffs have established a claim as creditors of the said insolvent for the sum of $6,500, and that they are entitled to rank as such for that amount with other creditors upon his estate in the hands of the defendants as assignees to be administered; and that the defendants do pay the plaintiffs their costs of this action to be taxed up to and inclusive of the 12th day of July, 1895, when a consent to rank for that sum was given.

As to the other costs of the action up to and inclusive of the costs of the trial, we think that neither party should have costs, the plaintiffs because they fail as to the whole residue of their claim as the result of the appeal, and the defendants because they succeed upon a point which, had

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it been raised on the pleadings, might have rendered a trial, or a large part of the costs subsequently incurred, unnecessary. As to the costs subsequent to the trial, and the costs of the appeal, the defendants must have those costs. As to the costs, if any, of the cross-appeal, no costs to either party. We do not, however, by this disposition of the costs mean to affect the right of the defendants as trustees to reimbursement or indemnity out of the estate in their hands for any costs not now awarded to them.

BURTON, and MACLENNAN, JJ. A., concurred.

*Appeal dismissed, and cross-appeal allowed.**

* See *Regina* v. *Hopkins*, [1896] 1 Q. B. 652; 40 Sol. J. 452, 460.—REP.

In re Small and St. Lawrence Foundry Company.

Arbitration and Award—Revocation of Submission—Rejection of Evidence—Rentals of Adjacent Properties.

It is not sufficient ground for the revocation of a submission to arbitration to fix the renewal ground rental of a block of land bounded by streets that the arbitrators decline to receive evidence of the gross and net rentals derived from properties on the other side of one of the streets.

Judgment of MEREDITH, J., affirmed, MACLENNAN, J. A., dissenting.

Statement.

THIS was an appeal from the judgment of MEREDITH, J.

The appellants were the executors and trustees of the estate of the late Dr. Small, who, in his lifetime, was the owner of a block of land in the city of Toronto of some two acres in extent, bounded on the north by King street, on the east by Parliament street, on the west by Berkeley street, and on the south by Front street.

On the 2nd of March, 1874, Dr. Small made a lease of the land to one William Hamilton and others for twenty-one years, at a yearly rental of $1,500, and the lease contained a provision that if the lessor should not at the expiration of the term wish to take over the building, it should be obligatory upon him to make a new lease for a further term of twenty-one years, "at such yearly rent as may be ascertained by valuation, but not to be less than the rent hereby reserved, to be made by arbitrators, such valuation to be made of the ground without including the buildings."

Pursuant to the provisions of this lease, arbitrators were appointed at the expiration of the term by the executors of the late Dr. Small, and by the respondents, who were assignees of the term, and upon the arbitration counsel for the executors tendered evidence as to the net annual income derived from house property, opposite to the block in question, separated from it by King street, and from other house and shop properties in the neighbourhood, it being stated by counsel that this net annual income was proposed to be ascertained by taking the gross annual

Statement. income derived from the properties and deducting therefrom interest on the value of the buildings, a sum for a sinking fund, insurance, taxes, cost of collecting rent, water-rates, allowance for vacancies, and any other outgoings properly chargeable. It was contended by counsel for the executors that the net income thus ascertained should be capitalized on the basis of such percentage as the arbitrators should think proper, and that the value of such adjacent properties so ascertained should be received as evidence going to shew the value of the property in question.

The property in question had for some forty years been used solely for manufacturing purposes.

The arbitrators refused to admit evidence of this nature, and the executors then moved to revoke the submission to arbitration, and the motion was dismissed by MEREDITH, J.

The executors appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, and MACLENNAN, JJ.A., on the 13th and 14th of May, 1896.

McCarthy, Q. C., and *R. B. Henderson*, for the appellants. The arbitrators having rejected this evidence on the ground that it was not legally admissible, and not having rejected it merely as a matter of discretion, the appellants are entitled to apply to the Court to have the submission to arbitration revoked, if the arbitrators are mistaken in the view which they have taken as to the admissibility of the evidence in question: *East and West India Dock Co.* v. *Kirk*, 12 App. Cas. 738. That they are mistaken is clear. It not being possible to give any evidence as to the selling value of the property in question, the only way to arrive at the value was to ascertain the values of other adjacent properties, and the evidence of the net rental received from such properties is a proper method of ascertaining the value as based on their actual producing power.

A. Hoskin, Q. C., and *Thomson*, Q. C., for the respon-

dents. The rejection of this evidence was a matter within the discretion of the arbitrators, and their discretion will not be interfered with: *James* v. *James*, 23 Q. B. D. 12. The lease provides for a valuation and not for an arbitration in the technical sense of the word, and the so-called arbitrators were entitled, if they saw fit, to act upon their own knowledge without taking any evidence at all: *In re Carus-Wilson and Greene*, 18 Q. B. D. 7. Even if, however, the matter is treated as an arbitration, the appeal must fail. The value or producing power of other lands used for entirely different purposes, is not evidence that should be acted upon in fixing the renewal rental of the piece of land now in question. The value that must be arrived at is the value for the purposes for which the land is being used and not a mere theoretical value for other possible purposes. Argument.

McCarthy, Q. C., in reply.

May 20th, 1896. HAGARTY, C. J. O.:—

I think that it is impossible for us to accede to the application made to us to allow the lessors to revoke the submission, the whole ground suggested therefor being the alleged rejection or refusal of the arbitrators to hear certain evidence.

I think that no case is made out for our holding that such evidence ought to have been received.

A very wide discretion must necessarily be left to the referees as to the conduct of the reference, and as to the sources from which information bearing on the subject matter in dispute may be properly obtained by them.

We find no trace of any refusal to listen to the opinions of witnesses as to the rental value of the premises. We find witnesses called to detail what they consider to be the productive value of other premises near to or in the neighbourhood of these lands after deducting all rates, charges, etc.

Judgment.

HAGARTY, C.J.O.

The referees appear to have considered that it was needless and inexpedient to pursue that line of evidence with a view of influencing their judgment or assist their arrival at a proper conclusion. I am unprepared to hold that they had not the right so to deal with such testimony.

I think it both improper and inexpedient to attempt to lay down any hard and fast rule applicable to all cases of this character. Every case must stand on its special facts.

Evidence may be in one sense admissible, although valueless in the view of those who have to form their judgment thereon.

I think the refusal of referees or valuators to pursue such enquiries to any extent the lessors might require, may be quite justifiable under the large powers with which they are necessarily entrusted.

In forming their decision as to the point submitted to them, they may decline entering upon the numberless "*res inter alios acta*" involved in the calculation which may be made by neighbouring owners as to the net value of their own properties.

It is merely a question of degree as to the opinion of an adjoining owner, and that of another living one or two streets off.

I repeat that my opinion is based wholly on what is before us in the present case, and not as attempting to lay out any rule of universal application as to admissibility of evidence.

There is no suggestion of any unfairness or impropriety of any kind on the part of the arbitrators; and it seems to me that we cannot in this case hold them wrong in the course they have taken.

They surely must have the right to consider that a certain class of so-called evidence as to other properties has not, and ought not to have, any weight or value to help them to a decision, and they may therefore properly decline any further hearing of it.

BURTON, J. A. :—

Judgment.

BURTON, J.A.

This application was in form an application for liberty to revoke a submission on the ground that the arbitrators had refused to receive evidence which was in point of law relevant and receivable; and the learned Judge to whom the application was made dismissed it, giving no written reasons.

There is no appeal given in an arbitration of this nature. The parties, therefore, have taken the proper course for obtaining the opinion of the Court as to the admissibility of the evidence, which it was admitted on the argument was what was desired. I feel quite clear that we cannot interfere with the decision of the learned Judge, who, in my opinion, could not have acted in the manner proposed by giving the plaintiffs leave to revoke the submission unless the evidence on which he is called upon to act is sufficient to satisfy him that a failure to do so will involve a miscarriage of justice in the matter of the arbitration itself.

I adopt the language of Mr. Justice Grove, that the Courts will not exercise the power upon the mere admission or rejection of evidence, if the arbitrators acted *bonâ fide* and reasonably in the matter. It must be, in my opinion, a very strong case, amounting almost to misconduct, which would warrant the interposition of the Court.

Here no one would think of imputing any thing in the nature of misconduct to the highly respectable gentlemen to whom the parties have mutually agreed to submit the question involved in this arbitration.

But in addition, I am prepared to state my own opinion that the arbitrators were right in declining to receive the evidence tendered; and I feel no doubt that if similar evidence had been tendered in a court of law, it would have been the duty of the presiding judge to regard it as tending to raise a multiplicity of collateral issues confusing the jury and acting as a surprise upon the parties.

Judgment.

BURTON, J.A.

Without dogmatizing as to what might or might not be relevant under particular circumstances, I think the arbitrators were correct in declining to receive the evidence tendered.

MACLENNAN, J. A.:—

The arbitration is for the purpose of fixing the rent proper to be paid for the land in question annually for a term of twenty-one years. The land is a block containing two and one-seventh acres, nearly rectangular in shape, and bounded on its four sides by streets. The submission is contained in a lease for twenty-one years which has just expired, and which contained a covenant for a renewal for a new term of the same duration, at a rent to be fixed by arbitrators mutually chosen by the lessor and lessees, the new rent, however, not to be less than that reserved in the expiring lease. There has been no sale of the reversion or fee simple of the land for fifty years or more; and it has been during the term which has just expired, and is now, wholly in the occupation of the immediate lessees themselves, and not of under-tenants. There has, therefore, been no sale or lease of the land itself or of any part thereof, or any dealing with it of any kind; nor are there any facts connected with it or with its use or occupation which could assist the judgment of the arbitrators.

The rent reserved in the lease which has just expired, $1,500 per annum, is no doubt some evidence that the land is worth that much, but it is no evidence that it is worth more, which is the question for decision.

It seems plain, therefore, that the arbitrators must cross the street, and that the only source to which to look for evidence is adjoining property. Witnesses who have knowledge and experience of sales or leases of adjacent property, must, therefore, in my opinion, be allowed to prove such sales or leases, and unless they are, I do not know what other evidence can be got. No man's opinion upon such a matter can be of any value unless it is foun-

Judgment.

MACLENNAN, J.A.

ded upon such knowledge. The value of land is like the value of anything else; it is what it will bring, and the value of the property in question may be shewn by sales or leases of adjacent property. If it be desired to prove the value of a farm, which has been for many years, and is still, in the possession of the owner, and has never been sold or let to any one, are not actual sales of other farms in the neighbourhood of like quality good evidence? Unless they are, it must be impossible to prove its value at all. It must be the same if the question is one of leasing for a term. A lease for twenty-one years is a sale *pro tanto*, and the rent agreed to be paid is the price or value of what is thus sold, whether it be paid in a single sum for the whole term, or in annual or other periodical payments, which is the usual practice.

In my opinion a sale of the fee is good evidence to assist in fixing an annual rent; and a lease for a term at a rack rent will assist in fixing the value for the purpose of a sale of the fee. Here what is to be ascertained is a ground rent. There are buildings and improvements upon the land; and the arbitrators must exclude in their estimate the value of the buildings and other improvements, and endeavour to find out how much of the total value belongs to the land itself. Everything else must be eliminated from the estimate. Now, I do not see why it is not good evidence, nor why it may not greatly assist them in their enquiry, to be informed what similar neighbouring property yields to its owners, excluding in like manner the value of the buildings and other improvements. The land in question, and also, I believe, all the adjoining land is only useful as building ground, and its value, whether for selling or leasing, depends upon the profit in money which can be obtained from it when built upon. Therefore it appears to me that the evidence which was offered to the arbitrators was good and proper evidence for the purpose of the enquiry in which they were engaged. If the owner of land, having built upon it, and let it to one or more tenants, whether for long or short terms, desired

Judgment.

MACLENNAN, J.A.

to find out what return he was receiving from the land itself, he could only arrive at that by making up an account and charging against gross income a proper sum for interest, repairs, insurance, and other expenses of that kind; and if that is so, I think evidence of value obtained in that way of land adjoining to the block in question ought not to have been refused by the arbitrators.

No one would suppose for a moment that these gentlemen rejected the evidence which was tendered to them from any improper motive; but, in my judgment, I think they were wrong in point of law in doing so. Of course it rests with them entirely to say what weight they will attach to this or any other evidence when laid before them. It is for that they have been chosen and appointed by the parties.

I think the appeal should be allowed.

Appeal dismissed, MACLENNAN, J. A., *dissenting.*

CONSUMERS' GAS COMPANY OF TORONTO

v.

CITY OF TORONTO.

Assessment and Taxes—Toronto Gas Company—Mains and Pipes.

The mains and pipes of the Consumers' Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.).

Toronto Street R. W. Co. v. *Fleming*, 37 U. C. R. 116, considered.

Judgment of BOYD, C., 26 O. R. 722, affirmed, OSLER, J. A., dissenting.

Statement.

THIS was an appeal by the plaintiffs from the judgment of BOYD, C., reported 26 O. R. 722.

The action was brought to determine the validity of the assessment by the defendants of the mains and pipes of the plaintiffs, and the facts were stated in a special case printed in the report below, and the line of argument is there indicated.

The appeal was argued before OSLER, and MACLENNAN, JJ. A., and ROSE, J., on the 21st of January, 1896.

McCarthy, Q. C., *S. H. Blake*, Q. C., and *Miller*, Q. C., for the appellants.

Robinson, Q. C., and *T. Caswell*, for the respondents.

June 30th, 1896. MACLENNAN, J. A.:—

I am of opinion that this appeal should be dismissed.

I agree with the judgment of the learned Chancellor, and with his reasons, and they cover the whole field of the argument so completely that I am unable usefully to add anything to what he has written.

The whole case, in my opinion, is summed up in this; that the property in question is the soil and freehold of the company, and although it is locally situate beneath the surface of the public road or way, and was originally part of it, it is no longer any part of the road or way, but is the freehold of the plaintiffs. That being so, I think it is land within the meaning of the Assessment Act, 55 Vict.

Judgment.

MACLENNAN, J.A.

ch. 48 (O.), and is assessable against the company as the owner, as directed by sections 15 and 16 of the Act.

Great reliance was placed by the appellants upon the judgment of this Court in *Toronto Street R. W. Co.*, v. *Fleming*, 37 U. C. R. 116, in which it was held that the portions of the streets occupied by the company for their railway were not assessable under the Assessment Act of 1869.

In addition to the observations of the learned Chancellor on that case, it is noticeable that the present Assessment Act differs from the Act of 1869, so as to make the greatest part of Mr. Justice Patterson's judgment inapplicable to this case. That learned Judge laid great stress upon the use of the word "land," in section 9 of the Act, as descriptive of the subject of taxation, and not "real estate" or "property." At page 127, he says: "If there was a general law that all property should be assessable for municipal purposes, I should have no hesitation in deciding that this was assessable property. The question, however, is, is it assessable as land?"

The Act of 1869, declared that "all land and personal property in the Province," should be liable to taxation, subject to the exemptions named; whereas the present Act, section 7, declares that "all property in this Province, shall be liable to taxation," subject, etc.; thus using the very language which the learned Judge considered would have authorized the taxation of the interest of the Street Railway Company. The present Assessment Act also contains another section, which was not found in the Act of 1869, namely, section 9, which declares that "all real property situate within, but owned out of the Province, shall be liable to assessment in the same manner and subject to the like exemptions as other real property under the provisions of this Act."

I think this last section greatly strengthens the argument that the intention of the Legislature, to be derived from the existing statute, is that everything legally an-

swering the description of property real and personal, not expressly exempt, shall be liable to taxation.

Judgment.

MACLENNAN, J.A.

I, therefore, agree with the learned Chancellor that this case is not governed by the judgment referred to, and that the appeal should be dismissed.

ROSE, J.:—

The question which we are to consider, is stated in paragraph 9 of the special case as follows:—

"The said Judge was then asked to consider and consider only, the question of whether the mains and pipes belonging to the said company and laid in the city streets, and attached to the said plant and buildings, were exempt from taxation, and after hearing the arguments adduced by the solicitors for the said company and for the defendants, the said Judge decided that the said mains and pipes were assessable." From this it appears that the mains and pipes were attached to the plant and buildings of the appellant company; and secondly that they were laid in the city streets.

As I understand the judgment appealed from, the mains and pipes were held assessable on the ground that they are real property and not exempt, as being part of the public streets. I am of opinion, with my learned brother Osler, that there is practically no distinction between this case and *Toronto Street R. W. Co.*, v. *Fleming*, 37 U. C. R. 116. I see no substantial distinction in fact or in law between rails laid upon the streets and pipes laid in the streets for the purpose of the question which we are considering. Although the use of the rails may not be exclusive, the occupation of the land by the rails is exclusive and continuous as much as is the occupation by the mains and pipes; the use of which might be intermittent. If such mains and pipes are to be considered "land" because they occupy a portion of the streets, then it seems to me that if the land which they thus occupy is exempt, the fact of the occupation thereof by the mains and pipes, cannot remove the exemption and make such land assessable.

Judgment.

ROSE, J.

To yield to the argument that there is a substantial distinction to be drawn between this case and the case of *Toronto Street R. W. Co.*, v. *Fleming*, 37 U. C. R. 116, would be to hold that a gas pipe laid on the surface of the street would not be assessable, while the same pipe laid immediately under the surface, would be assessable, unless, indeed, there is a distinction to be drawn between the occupation of land by rails and pipes.

I need not attempt to elaborate, for my learned brother Osler has dealt so fully with the question as in my opinion to leave little room for further discussion. But looking at the Act of incorporation and the amending Acts, I cannot agree that the occupation of the ground under such Acts by the mains and pipes, makes such mains and pipes land within the meaning of the statute. I think I do not fail to appreciate the force of the decisions in the English Courts referred to, and I could well understand, applying the law there to the facts here, that the company would be held, for the purpose of rating, to be an owner or occupier of the land upon which or through which its mains and pipes were carried ; but it seems to me clear that it was never intended when the license or permission was given to the company to carry its pipes through the streets of the city, to give to it any title to or property in the land, or to give to the city any title to or property in the mains and pipes. The mains and pipes remain the property of the company, the land remains the property of the city, and provision is made for the purchase by the city of this property of the company, and for the removal by the company of such property from the land of the city.

We find provision made in section 25 of 11 Vict. ch. 14, " that neither the service nor connecting pipes of the said company, nor any meter belonging to the said company, shall be taken or seized for rent due to landlords, for the debts of any person or persons to or for whose use or the use of whose house or building the same may be supplied by the company ; any law or practice to the con-

trary notwithstanding." This clause follows the provision (section 14), enabling the company to exercise its rights over buildings the property of persons other than those whom the company proposes to supply with gas. This provision seems to me to emphasize what I have referred to, viz., that in the legislation in question, a clear distinction is constantly maintained between the property of the company and the property of the city, or of any other person, over which rights were given by the statute.

Judgment.

ROSE, J.

But this does not dispose of the appeal, for, as has been pointed out, the object of the legislation is to make all property bear its share of the burthen of assessment, and these mains and pipes, as I have pointed out, were attached to the plant and buildings, the property of the company, and apart from any question of title to the land in which they are laid, would be fixtures, and go to augment or increase the value of the property to which they were affixed. And when we find valuable buildings, plant, machinery and fixtures, all going to make one whole structure, having regard to the use for which they are constructed, it is manifest that under the declaration of the statute, "that all property in the Province shall be liable to taxation," this property is liable to taxation, unless we find something to exempt it from taxation. I cannot conclude that because these pipes are laid in the city streets, they are severed from the property to which they are in fact affixed so as to exempt them from taxation. Clearly, in my opinion, their being so laid in the streets, does not make them liable to taxation; but being liable to taxation as property belonging to the company and attached to the plant and buildings of the company, I cannot see what is to take them out of the operation of the general clause or declaration that they are liable to taxation.

I can see no difference in principle between mains and pipes so attached, being laid in the ground, under the ground and in the air, supported in any manner practicable.

Judgment.

ROSE, J.

I think that they are liable to taxation as part of the property of the company, increasing the value of the buildings and plant and assessable against the company; and unless the provision requiring real property to be assessed in the ward in which it is situate, has severed this property from the plant and buildings to which it is physically attached, so as to not make it subject to the general provision, then it remains subject to such general provision, and is liable to taxation as part of the property being situate in the municipality. Ample provision is made for the collection of the rates. They may be levied by distress and sale, and although there may be difficulty in the sale and delivery of the pipes laid in the streets, the utmost that can be said as to that, it seems to me, is that some of the provisions for the recovery of taxes, which are applicable to other species of property, may not be applicable to this kind of property. That would leave the property still liable to taxation, and leave operative the other provisions of the statute for the recovery of the taxes assessed against such property. I am inclined to think that the provision requiring property to be assessed in the ward in which it is situate, if applicable at all to this kind of property, must be considered as directory, certainly not mandatory in the sense that if such assessment is not made in the ward in which the property is situate the company which owns this property, as part of the plant and buildings within the municipality, can be freed from the payment of taxes in respect of such property. It can make no difference to the company, as far as I can see, whether the whole assessment be in the ward in which the plant and buildings are situate, or whether it be apportioned amongst the various wards through which the pipes run, and unless such provision of the statute is for the benefit of the company, I do not see how its non-observance can be urged by the company as a ground upon which it becomes free from liability to taxation.

In my opinion the clause is not applicable to this kind

Judgment.
ROSE, J.

of property, but the mains and pipes are to be considered as fixtures attached to the plant and buildings, and as forming part of the whole property situate within the ward within which the plant and buildings are found, going to increase the value of such plant and buildings and so increasing the value upon which the assessment is to be made.

For these reasons I think the appeal should be dismissed with costs.

OSLER, J. A.:—

The appellants are a company incorporated by Act of Parliament, 11 Vict. ch. 14, for the purpose of supplying gas to the city of Toronto and its inhabitants; and this action was brought to recover back taxes paid by them to the respondents under an assessment which, as the appellants allege, is illegal and void.

This was an assessment of the mains and pipes belonging to the plaintiffs, laid by them in and under certain public streets and highways in the city under the authority conferred by their Act of incorporation. This part of the defendants' property had been assessed for the year 1894, at $500,000, and the assessment had been confirmed by the Court of Revision and by the County Judge.

The contention of the appellants was, and is, that the property in question was not of such a character as to be assessable, or to render them liable to be assessed in respect of it, because (1) it was either personal property, and therefore exempt under section 34, sub-section 2 of the Assessment Act, 55 Vict. ch. 48, (O.); or (2), if not personal property, was nevertheless not land, real property, or real estate taxable as such within the meaning of that Act, being merely mains and pipes laid in and under and forming part of the public streets and highways of the city, and therefore exempt under section 7, sub-section 6.

Shortly stated, the question is, whether these mains and pipes are property exempt from taxation, for that they are property of a most valuable description cannot be denied.

Judgment.

OSLER, J.A.

I am unable to agree that they are personal property. In their existing condition, and having regard to the purpose intended to be served by them, they possess few or none of the incidents of that species of property. They cannot be removed or repaired without disturbing the soil, below the surface of which they are deeply buried, and are closely and continuously connected with each other throughout all their ramifications, and at their very commencement with the land and works of the company where the gas to be conveyed through them is manufactured.

To decide that they are not personal property, does not necessarily determine that they are assessable.

It cannot but be regarded as significant that from the year 1859, until the present time, no attempt seems to have been made to assess property of this description.

The sections of the most recent Assessment Act now invoked in support of its liability to assessment, are, with the exception of a few trifling verbal changes, the same as they stood in the C. S. U. C. ch. 55, although these Acts have been amended and consolidated again and again; the principles of the English rating cases which have now been thought applicable, were not less so thirty-five years ago than they are to-day; and the case of *Toronto Street R.W.Co.* v. *Fleming*, 37 U. C. R. 116, in which it was decided, in 1875, that the plaintiffs were not assessable for those portions of the streets occupied by them by their railway as being land, remains untouched by legislative enactment or judicial decision.

In that case the difference in principle between the English system of rating or assessment and our own, is very clearly shewn in the judgments of Burton and Patterson, JJ.A. Under the former, it is "a personal charge upon the occupiers of every description of real estate, but it is a personal charge only, not a charge upon the land. Our Assessment Act, on the other hand, does not profess to rate the individual in respect of the property or the occupation of it, but provides that all land and personal property shall be liable to taxation, and then provides the machinery

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by which the assessment shall be made and the taxes levied. A man is not assessed by reason of his occupation of or having some estate or interest in the land, and the assessment made according to the value of that occupation or interest; but the land itself, the corpus, so to speak, is taxed, and the owner and the occupant are both made liable for the payment of the tax thus imposed upon it:" *per* Burton, J. A., p. 121.

In ascertaining what is to be regarded as assessable land, the system of assessment is to be regarded as a whole, and when you find that no means are provided for realizing the taxes sought to be imposed upon some particular species of property which has been assessed as land by the sale of such property, that is a strong argument that it is not to be regarded as land within the meaning of the Act, even though similar property may be deemed such under the English authorities for the purpose of rating the owner or occupier in respect of it.

It will be useful before considering more particularly the nature of the property which has been assessed here, and its liability to assessment, to look at some of the provisions of the company's Act of incorporation passed in the year 1848.

By the first section, they are empowered to purchase, take, and hold lands, tenements, and other real property, for the purposes of the company, and for the erection, etc., of gas works; and also to alienate such lands and other property, and others to purchase in their stead for the purposes aforesaid. Provided that such lands, etc., shall be so holden for the purposes and business of the company, and for constructing their necessary works for and about the same, and for no other purposes whatever; and that the total yearly value of the lands and real property to be so holden at any one time, shall not, over and above the value of the works thereon erected, exceed £2,000 currency.

The 13th section enacts that it shall be lawful for the company "to break up, dig and trench so much and so

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many of the streets, squares and public places of the city as may at any time be necessary for the laying down the mains and pipes to conduct the gas from the works of the company to the consumers thereof, or for taking up, renewing, altering, or repairing same, when the said company shall deem it expedient, etc., making the said openings in such parts of the said streets, squares and public places as the city surveyor, under the direction of the council, shall reasonably permit and point out."

I now turn to the Assessment Act, though I note in passing that the interest or right, whatever it may be called, which is conferred upon the company to lay their mains and pipes in the public streets, was evidently not deemed by the Legislature to be lands, tenements, or other real property which they were by the Act authorized to acquire.

I quote from the Consolidated Act of 1892, 55 Vict. ch. 48 (O.), referring to the corresponding sections of that of 1859: "Property shall include both real and personal property, as hereinafter defined: sec. 2, sub-sec. 8; C. S. U. C. ch. 55, sec. 5. "Land," "real property" and "real estate," respectively, shall include all buildings or other things erected upon or affixed to the land; and all machinery or other things so fixed to any building as to form in law part of the realty, etc.: sec. 2, sub-sec. 9; C. S. U. C. ch. 55, sec. 3.

It is not necessary to notice the interpretation clause, relating to personal property; nor do I think that the 16th section of the general interpretation clause affords us any assistance by introducing the interpretation clause of the Municipal Act relating to the word "land." Section 7—All property in this Province, shall be liable to taxation, subject to the following exemptions: C. S. U. C. ch. 55, sec. 9, "all land and personal property," etc., and so in R. S. O. 1877.

Exemptions—section 7, sub-section 6: Every public road and way, or public square: C. S. U. C. sec. 9, sub-sec. 6.

That the plaintiffs are occupiers of that space in the

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soil of the roads which is filled by their pipes and mains, and for a purpose beneficial to themselves, admits of no doubt, and if rates and taxes were to be imposed upon them as in England, in respect of their beneficial occupation, instead of upon the land so occupied, a multitude of cases shew that they would be assessable. Some of these may be briefly referred to, although they are quoted in the judgment below, for the purpose of shewing the view which has been held from a very early period, of the nature of the company's occupation. Many if not more of these cases arose upon the question of the company's liability to taxation for the poor rate : see 43 Eliz. ch. 2, as being occupiers of land within the meaning of that Act; *Rex* v. *Brighton Gas Light and Coke Co.*, [1826] 5 B. & C. 466. There the company was empowered to break up the soil of the street for the purpose of laying gas pipes therein, the language of the Act, in this respect, being very similar to the Act incorporating the plaintiff company. Bayley, J., said : "The pipes laid down so as to become part and parcel of the land for the time they remain." Holroyd, J. : "So long as the company use the land for the purpose of their pipes, they are rateable, for they have the exclusive occupation of that part of the land in which their pipes lie." And *per* Littledale, J. : "Here the pipes being fixed to the land, the land and pipes are to be considered as an entire thing. * * The company (is) in exclusive possession of that part of their land where the pipes lie."

To the same effect is *Regina* v. *Chelsea Water Works*, 5 B. & Ad. 156 (1833), and *Regina* v. *West Middlesex Water Works*, 1 E. & E. 717. Wightman, J., said : "The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie by force of some statute."

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And in 1855, in *Electric Telegraph Co.* v. *Overseers of Salford*, 11 Ex. 181, it was held that the company were liable to be rated for the relief of the poor in respect of their posts and wires placed along the line of a railway company, notwithstanding that the latter might require their removal to a more convenient place; and this because they had by their posts and wires the exclusive occupation of that which the law calls land.

"There is no reasonable distinction," says Alderson, B., "between the electric fluid passing through pipes in the air under water or in the soil. All the surface upwards and downwards is land. If there is a profitable occupation by the posts and wires, whether under ground or in the air, it is an actual occupation of the surface."

Before referring more particularly to the *Fleming Case*, I must notice the case of *Pimlico Tramway Co.* v. *Greenwich Union*, L. R. 9 Q. B. 9.

It will be seen on examining it, that the position of the tramway company as regards their rails and the user of the highway on which such rails were laid, was exactly the same as that of the street railway company in the *Fleming Case*. Their rails were laid level with the surface of the street, and the public had the same right of way over the street just as if the tramway had not been laid down, except that they might not use it in the way in which the company were authorized to use it, viz., with flanged rails. In the *Pimlico Case*, the company were held liable to be rated; and I quote a passage from the judgment of Blackburn, J., which shews that this was on the very same grounds that telegraph, water and gas companies were held liable to be rated for their mains and pipes. "It seems to me (he said), that they are occupiers of land to the same extent and in the same manner as in the cases which are now perfectly well established, and of every day occurrence, where a gas company or a water works company lay in the road their main pipes, and carry them along the road under the surface of the soil, instead of coming above it, in which, in respect of their pipes, which carry the water from the

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supply to the place where it is to be distributed, the company are held liable as occupiers of so much of the land as the pipes occupy for the purpose, the beneficial value of which occupation is to be got at by considering that it facilitates their carrying gas or water from the point of supply to the point of distribution. I am, therefore, of opinion, that the promoters of the tramway are occupiers of the land in the same sense that the owners of the pipes are. There is a considerable resemblance between the iron tram metal or artificial tramway here and the pipe which is laid down, though there is this difference undoubtedly, that the pipe—I do not know that it is absolutely necessary that it should be so—is generally buried in the soil some way below the causeway, pavement, or macadamized road which forms the thing actually supporting the carriages of the public passing along, but I do not think that makes any difference." Every word of this passage supported the contention of the defendants in the *Fleming Case*, as to the right to assess the portions of the streets occupied by the company for the purposes of their railway, shewing, as it does, that there was no essential distinction between a beneficial and exclusive occupation of the surface of the road, the *via trita*, and the occupation of a portion of the soil of the road below the surface by mains and pipes. In both cases the companies were rated as being the beneficial and exclusive occupiers of land. Nevertheless this Court in the *Fleming Case*, to whom all the authorities which had then been decided on the subject were familiar, as may be seen from the report, distinguished that case from all these decisions, including that of *Pimlico* v. *Greenwich Union*, on the ground that the land in question came within the exemption in section 7, sub-section 6.

I was at one time disposed to think otherwise, but further consideration has convinced me, with all deference to the learned Chancellor, that this case cannot justly be distinguished from the former case in this Court, and that it would be treating that case in too slight and insufficient a

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manner to regard it as a decision upon the mere occupation of the surface, the *via trita* of the road. That is not the *ratio decidendi.*

Burton, J. A., at p. 122, says the Act contemplates "property to be let by a landlord to a tenant. The whole scope is to throw the tax as a charge upon the landlord, and the tenant having paid it is entitled to deduct it out of the rent; and the provisions in reference to the sale in the event of non-payment, are wholly inapplicable to such a subject as the property now sought to be taxed."

Patterson, J. A. (p. 127): "The property of these defendants (the railway company) is only land as being part of the public street. * * If this land is taxable, it is liable to be sold for non-payment of taxes. In order to sell any right or interest or franchise, or anything but the very land itself, some provision of law would be necessary, which I do not find in the Assessment Act. Without resorting to the exemption in sub-section 6, I should hold that the whole scope of the Act, including the provisions for valuing land, the mode of assessment, the proceedings for the sale and conveyance of the land, and the occupation of it by the purchaser, are so inapplicable as to shew that this property is not taxable land; but having regard to the exemption of every public road, there is not, in my judgment, room for further argument. The streets remain public streets. * * What is it that is exempted by sub-section 6—the soil or the right of way over the soil? Evidently the soil itself, because the soil alone and not a right of way is land and taxable unless exempted, and because, although the word 'way,' or even the word 'road,' may be ambiguous, there is no ambiguity in the words 'public square,' which occur in the same sub-section. * * Then if the soil of the street is exempt, I find nothing in the Act to say that that portion of it is not exempt which is occupied by the plaintiffs' railway, while still remaining a part of the public road, but is to be taxed and to be (as the consequence would be) sold in case the taxes are not paid." In substance, much of what Burton, J. A., says at p. 123, is to the same effect.

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The reasons given, apply, it appears to me, with double force to the case before us, and to the attempt to tax as land the space in the soil of the road occupied by the mains and pipes of the plaintiffs, or those mains and pipes themselves.

The impossibility of applying the provisions of the Act as to selling such property as land, is obvious. Notwithstanding its exclusive and beneficial enjoyment by the defendants, it still remains part of the road, just as if the mains and pipes had been laid level with its surface, as, but for climatic conditions, they might have been.

I think we ought not to attempt to refine away the decision in the *Fleming Case*, by treating it as confined to the case of rails laid on the surface, and not applicable to that of pipes sunk in the soil of the street, nor in order to impose a burden upon this species of property to which it has hitherto never been deemed to be subject, need we labour to apply to one system of assessment cases decided *alio intuitu* with reference to another.

I do not deem it necessary to enter at large into the question whether the property is to be regarded as fixtures and taxable as such, as that has been considered and decided in the case already so fully referred to. The pipes and mains are no more fixtures to the defendants' lands than were the rails of the street railway.

Nor do I rest my judgment on *Chelsea Water Works* v. *Bowley*, 17 Q. B. 358, cited in that case, though unnecessarily, in support of the judgment.

I think the property is not taxable under sub-section 7 of section 7, as being property belonging to the municipality, but occupied by some person as tenant or lessee, or otherwise than as a servant or officer of the municipality for the purposes thereof. This clause adds force to the view that assessable property is property such as may be let by a landlord to a tenant. This point was also decided in the *Fleming Case*. I hold the present case to be plainly covered by our former decision, and would, therefore, allow the appeal.

Appeal dismissed, OSLER, J. A., *dissenting*.

JOHNSTON v. CONSUMERS' GAS COMPANY OF TORONTO.

Toronto Gas Company—Reserve Fund—Plant Renewal Fund.

The judgment of FERGUSON, J., 27 O. R. 9, was reversed on the ground that there being no admission in the stated case of any over-payment by the plaintiffs, they had no *locus standi*.

Statement. THIS was an appeal by the defendants from the judgment of FERGUSON, J., reported 27 O. R. 9, in an action calling in question the mode in which the accounts of the defendants were kept.

The facts and arguments are stated in the report below.

The appeal was argued before OSLER, and MACLENNAN, JJ.A., and ROSE, J., on the 21st, 22nd and 23rd of January, 1896.

McCarthy, Q.C., *S. H. Blake*, Q.C., and *Miller*, Q.C., for the appellants.

Robinson, Q.C., and *John McGregor*, for the respondents.

June 30th, 1896. MACLENNAN, J.A.:—

It is important at the outset to ascertain the relation in which the company stands to its customers, called in the Act of 1887, the consumers. An examination of the Acts relating to the company prior to that of 1887, does not disclose any obligation to supply gas to any particular person, and with one exception, the company was as free in the conduct of its business, and the disposition of its property as any other corporation or individual. That exception was a restriction upon the power of paying dividends, which was limited to ten per cent. per annum upon its paid-up capital. The corporate franchises included very extensive powers of laying down mains and service pipes in the streets of Toronto, and the restriction upon dividend was evidently intended to ensure, to some extent,

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reasonable prices for gas to consumers. Subject to that reduction, the company was perfectly free. It could supply gas to one person, and refuse to supply it to another. It could sell at one price to one customer, and stipulate for a different price from another, and in every case might make the best bargain it could, just as any other vendor of any other commodity might do. The Legislature probably thought that the company might, in their own interest, be trusted to treat their customers with fairness and liberality; and that if they did not do so, the same power which conferred their franchises could modify or withdraw them. Until the Act of 1887, therefore, the company could charge what they pleased for their gas, and the relation between them and their customers was in every instance merely a relation of contract. The corporation of Toronto was a large consumer for street lighting and otherwise, and the two corporations made the best bargain they could with each other. So, also, the company could and did make special bargains with persons who consumed very large quantities, supplying them at lower rates than others.

That was the position of the company prior to the Act of 1887. That Act was applied for by the company, and obtained for the purpose of enabling it to increase its capital. The application was opposed by the city of Toronto. It contains a number of special provisions relating to a rest or reserve fund, a plant and building renewal fund, and a special surplus fund to be created and maintained by the company; and by section 7 it was declared that whenever the amount of such surplus fund should be equal to five per cent. per thousand cubic feet on the quantity of gas sold during the preceding year, the price of gas should be reduced for the then current year at least five cents per thousand cubic feet to all consumers. It also contains a clause authorizing an auditor appointed by the corporation of Toronto to be present at the company's annual audit, with access to the company's books, accounts and papers, for the purpose of verifying the company's annual statement. The time at which

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the amount of the surplus fund provided for by the Act is to be ascertained is the end of the company's fiscal year. The pleadings do not state what that time is, but it may be inferred from the schedules annexed to the special case that the end of the fiscal year is the 30th of September. The enactment, therefore, is that whenever the account made up for any year, ending on the 30th of September, shews a certain surplus, the price of gas for the ensuing year shall be reduced at least five per cent. per thousand feet to all consumers. There is nothing else in the Act affecting the relation of the company to consumers.

The company can still choose its customers, and is still under no obligation to sell to any particular person, unless it chooses to do so. The Act has not made it compulsory to sell gas to every one, nor is any one compelled to buy from them. It follows that the consumers who are mentioned in the Act are those persons to whom the company thinks fit to sell, and who are willing and agree to buy from them. In other words, the consumers' relation to the company must still be a relation of contract, and there is nothing to prevent the latter from terminating any particular contract just as they could before the Act. Then what is the effect of this provision of the Act for a reduction of price? I think it is no more than this: that in every case in which the company chooses to continue to supply gas to a person who had been a consumer in the previous year, this provision of the statute as to a reduction of price must be read into the contract. I do not see how in any year the statute can be applied to the case of a person who was not a consumer at all in the preceding year. There can be no reduction unless there is something to reduce, and if during any year there was no supply, there could be no price to reduce for the following year.

The schedules forming part of the special case shew that the company's general practice has been to classify their customers, and to charge a different price to each class, but the same price to the members of each class. They

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seem to have a special bargain with the corporation of Toronto for street lighting at so much per lamp for a term of years. There is, however, nothing in any of the company's Acts requiring any degree of uniformity of price, or forbidding discrimination among their customers. There is, therefore, nothing that can be called a price, or the price of gas, in a general sense, to which the words of the statute are to be applied. The price depends on the contract, express or implied, between the company and each consumer, and it is to that price the words of the Act are to be applied. The plaintiffs, however, have been consumers ever since 1887, and so there must have been some contract between the company and them during that time, express or implied. We are not told what that contract was, but whatever it was, it must be regarded as containing, as one of its terms, the statutory provision as to reduction of price; and the plaintiffs were entitled at the end of each year to have a reduction of five cents per thousand for the following year whenever the company's surplus account was such as to warrant it. It would seem, however, that if in any year the surplus account did not come up to the named limit, the price for the following year would be matter for a new contract in every case, in the making of which the company would be completely unfettered by anything contained in the Act.

Such being the effect of the statute, and the plaintiffs having been consumers ever since it became law, under some contract, express or implied, they brought their action against the company on the 22nd February, 1894.

They allege that they have been consumers of gas ever since the passing of the Act, and have paid the company large sums therefor, and are entitled to the benefit of the provisions of the Act. In paragraph 23, they put their case thus: "They have been compelled to pay and have paid to defendant company during the years 1889, 1890, 1891, 1892 and 1893, large sums of gas rents in excess of what was justly due to the defendant company, and which, through the wrongful acts of the company, have been paid

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to them as aforesaid, and claim a return of the same from the said defendant company, and that an account may be had for that purpose." The fifteenth paragraph of the special case contains this statement: "The plaintiff Johnston, has been a consumer of gas since 1887, and has paid large sums of money to the defendants therefor. In the month of January, 1893, the plaintiffs, the Toronto Type Foundry Company (Limited), notified the defendant company that they had purchased Johnston's business, and that for the future all gas bills were to be charged to the Type Foundry Company. This was not done, and the plaintiff Johnston, is, and always has been, primarily liable to the defendant company therefor, and that the plaintiff Johnston, is the managing director and the largest stockholder in the Toronto Type Foundry Company (Limited)." The plaintiffs' cause of action then appears to be that, having regard to the statute, they have paid more than they ought to have paid for the gas which they have received from the defendants for a number of years past, and they seek to recover back what they have overpaid. The action to recover back money paid is a very familiar one. It is the old common law money count of "money had and received," and I think, notwithstanding its great length, that is the only cause of action alleged in the statement of claim. If the plaintiffs are entitled to recover back any part of the money which they have paid to the defendants for gas, they have a cause of action, if not, they have none. Unless they have paid money under circumstances which entitle them to recover it back, their action ought to be dismissed, and they have no concern with the way the defendants have kept their accounts, or with the application which they have made of their premiums and earnings. If the plaintiffs have had the benefit of a reduction of price that is all they are entitled to, and if they have not, yet the moment they receive it they are entitled to nothing further; they have no longer any interest in the accounts. They have then no more right to question the company's conduct of its business, or its manner of

keeping its accounts than any stranger. I think, therefore, this appeal comes to this, that if upon the case stated the plaintiffs are entitled to recover back money which they have paid to the defendants, there ought to be judgment in their favour, but, if not, the action ought to be dismissed. The case must then be examined to see if they are so entitled, and although that, if anything, is the only relief the plaintiffs are entitled to, strangely enough it is not one of the numerous claims made in the pleading, unless it be found in a shadowy form in the sixth clause which is that the defendants may be declared to be trustees for the plaintiffs of all sums of money by them received and misappropriated, and which should have been allowed to the plaintiffs in the reduction of the price of gas as provided by the Act. It is needless to point out that there is nothing whatever proved or admitted which could give rise to a trust between the defendants and the plaintiffs. The other claims are for the taking of various accounts, and for a number of mandatory orders. Although the pleadings and the special case are very lengthy, they are singularly wanting in the most material facts. The nature of the contract under which the gas was supplied and consumed is not stated, nor the quantity taken, nor the price paid, either for the whole or any part of the period, nor are we informed of any of the circumstances under which overpayment was made. All that is alleged is what has already been quoted, namely, that they paid large sums in excess of what was justly due; but there is no proof or admission of overpayment.

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It is alleged that by reason of the promises and the misapplication of profits, etc., by the company, they were compelled to pay the money; but none of the matters alleged or admitted amounts to any sort of compulsion. The neglect or refusal of the company to make up the accounts prescribed by the statute, or to make them up in the prescribed manner, could not oblige the plaintiffs to make overpayment. In fact, no overpayment is proved or admitted, either in the statement of defence or in the

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special case. On the contrary, the defendants, in their defence, deny any overpayment, and allege that they have made reductions in price to the plaintiffs greater than they would be required to make if they had made up accounts according to the plaintiffs' contentions.

There is nothing to the contrary of that in the special case, the statement being merely that the plaintiffs have, since 1887, paid the defendants large sums for gas. The case as it stands before us now, is that there is no proof or admission that there has been any overpayment whatsoever. It cannot, as I think, be denied that if at the end of each year the plaintiffs demanded and were allowed for the next year a deduction of five cents per thousand on the price of the preceding year, the plaintiffs could claim nothing further. They could claim no examination or investigation of the defendants' accounts, or of the investment or application of the defendants' funds. For anything that is proved or admitted to the contrary in the pleadings or in the case stated, the fact may be as alleged by the defendants, that the plaintiffs have had the reductions of price to which they were entitled under the Act. That being so, they have not made out a cause of action, and the judgment on the case stated ought to be for the defendants.

But even if it had been admitted that overpayment had been made, that alone would not have entitled the plaintiffs to judgment. It is not a matter of course to recover back money paid, which need not have been paid: *Marriot* v. *Hampton*, 2 Sm. L. C. 110th ed., 409. We look in vain in the pleadings and the special case for any facts or circumstances such as, even if there was overpayment as alleged, would entitle the plaintiffs in law to recover it back.

There is a demurrer to the statement of claim on the ground that no cause of action is disclosed, and that the plaintiffs cannot sue on behalf of other consumers of gas. There is also a statement of defence, and the demurrer was ordered to stand over for decision at the trial. The first question stated in the special case for the determination of

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the Court is whether upon the facts therein stated the plaintiffs, or either of them, have or has a right to maintain the action, and it is agreed that judgment shall be for the plaintiffs or defendants according to the result. I am of opinion that both upon the demurrer and the special case the plaintiffs fail, and that they have not made out a case for the recovery of the alleged overpayment.

Not being entitled to recover the overpayment, it follows that they are not entitled to the accounts and enquiries and mandatory orders claimed in their pleading, or the other relief directed by the judgment. The only importance or use of such accounts and enquiries is to shew a right to a reduction of price, in case the right was disputed or refused. The plaintiffs cannot have any general right to compel the defendants to observe the provisions of the statute. Such right as they have depends on whether they are consumers of gas, and *non constat* that the company will deal with them any more. It may be that if a consumer, when he comes to pay his bill, demands a reduction in price according to the provisions of the statute, and it is denied him on the ground that the state of the surplus account does not oblige them to grant it, he may be entitled to an account and to have it made up as prescribed, but if his demand of a reduction is acceded to, he has no further concern in the company's affairs.

The action of the named plaintiffs failing, as I think it does, it is unnecessary to decide the question which was much debated, whether, in such a case, the plaintiffs can properly sue on behalf of all other consumers. I may say, however, having considered the question very carefully, that I think they cannot. The plaintiffs' cause of action, and their only cause of action is overpayment. It is not alleged that all or any of the other consumers have made overpayments, and unless they have they have no claim. Moreover, every consumer has a separate contract with the company, and the fact that the provision of the statute as to reduction of price is to be regarded as a term of all such contracts, makes no difference in that respect, they are all

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separate contracts still. Again, even if it could be supposed that every consumer had made overpayments, the right to recover them back is not a matter of course, but depends in each case on the circumstances under which they were made, and, therefore, each consumer has, if anything, a separate cause of action. Apart from his right to a reduction of price, a consumer has no right whatever to interfere in the internal affairs of the company, and the relief sought in this action being merely the recovery of a sum of money with which other consumers have nothing to do, I think the authorities shew that they could not all join in one action, and, if so, it follows that one cannot sue on behalf of the others as well as himself.

The case is like that of *Smurthwaite* v. *Hannay*, [1893] 2 Q. B. 412, and [1894] A. C. 494, in which it was held by the House of Lords, reversing the Court of Appeal, that although the claims of all the plaintiffs arose out of the same occurrence, and were as far as possible identical, yet because the contracts were separate, the plaintiffs could not all sue in one action. See also *Sadler* v. *Great Western R. W. Co.*, [1895] 2 Q. B. 688 ; 12 Times L. R. 394.

I am, therefore, of opinion that the plaintiffs' action should be dismissed, and that being so, I think we are not called upon to express any opinion on the other questions propounded in the special case. The appeal should therefore be allowed.

OSLER, J.A.:—

I have had an opportunity of reading the judgment just delivered by my brother Maclennan, and I agree in the conclusion at which he has arrived.

ROSE, J.:—

In the special case it is said that the judgment of the Court is to proceed upon the facts stated in the case, that the pleadings are annexed and may be referred to as shewing the questions in issue. Then follows a statement of

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facts, and upon such facts the Court is asked to determine among other things, first "whether the plaintiffs or either of them have or has a right to maintain this action."

Referring to the pleadings to ascertain the questions in issue, we find from the 23rd paragraph of the statement of claim that the plaintiffs claim a return from the defendant company of large sums of money paid for gas rents, alleged to have been paid to the company in excess of what was justly due, and further claim "that an account may be had for that purpose," the "purpose" being, I suppose, to obtain an order for the return of the money so paid in excess. In order, therefore, to make out a cause of action, the plaintiffs must shew the payments in excess. These payments were, by the 23rd paragraph, alleged to have been paid through the wrongful acts of the company. I agree to what my learned brother Maclennan has said, that there does not appear upon the facts stated, any admission by the company of wrongful overpayment or of an overpayment at all.

The company specifically denies the correctness of the plaintiffs' statements, and by paragraph 5 of the statement of defence, says that the surplus profits have never amounted to such a sum as would impose on the company the duty of reducing the price of gas, under the provisions of the Act, and that it has, from time to time, voluntarily reduced the price of gas to a much greater extent than would have been incumbent on it to do had it acted in the premises in accordance with the plaintiffs' contentions, and further says, that all consumers of gas furnished by the company have paid therefor, since the passing of the Act, less than the company had the right to charge and collect.

As I make it out, between the passing of the Act and the date of issuing the writ five fiscal years elapsed, and assuming that the amount of net profit in each of the five fiscal years equalled five cents per thousand cubic feet on the quantity of gas sold during the preceding year, the outside sum by which the plaintiffs could have asked to have had the price of gas reduced for the five years would

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be twenty-five cents per thousand cubic feet on the whole quantity of gas supplied to them during the five years. And it appears from the annual reports of the directors of the company, pages 25, 39 and 54 of the appeal book, that the price of gas was reduced from the 1st of October, 1885, to the 1st of October, 1893, by the sum of forty cents per thousand cubic feet. So that not only does it not appear, as pointed out by my learned brother Maclennan, that the plaintiffs have paid any sum in excess of what was properly chargeable, but it does appear that reductions have been made which possibly and probably have given the plaintiffs more than they were entitled to on any view of the facts as alleged by them. The reduction made in 1889 and 1893 to consumers of over 500,000 cubic feet per annum was twenty cents per thousand. Assuming, therefore, what we do not know, that the plaintiffs were consumers of over 500,000 cubic feet per annum, it appears from these reports that they had an actual reduction in the price of twenty cents per thousand cubic feet during the five years. I am, therefore, unable to say that on the facts stated, the plaintiffs have paid any sum in excess of what they were bound to pay.

It is not in my view, therefore, necessary for me to consider any other question, because the plaintiffs would not be entitled to an account without first shewing that as a result of taking the accounts they would be entitled to have an order made for the repayment to them of moneys paid by them in excess of what was lawfully chargeable.

For these reasons, and without expressing any opinion as to the rights which any consumer would have upon a contract made since 1887, if the company agreed to supply him with gas without any agreement being made as to the price at which such gas should be supplied, and leaving myself open to consider such question if it become necessary to do so, I agree that the action fails, and this appeal must be allowed with costs.

Appeal allowed.

HENDERSON V. HENDERSON.

Limitation of Actions—Purchase of Farm—Mortgage to Secure Purchase Money—Possession by Son of Purchaser—Payment of Mortgage—Effect of Discharge.

In March, 1881, the plaintiffs' testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,600, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understanding that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid he should have the farm, subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage which, the balance being made up by the father, was paid off on the 30th of March, 1886, a statutory discharge acknowledging payment by the father being on that day made and registered. The father after this declined to convey the farm to the son and promised to leave it to him by his will, but died in 1894, leaving a will in favour of the plaintiffs. The son continued in possession of the farm until his death in 1893, and the defendants, to whom he devised his property, continued in possession after his death, this action being brought to eject them. From time to time during the lifetime of the son the father had spent a few days at the farm, but had not actively interfered in the management :—

Held, per HAGARTY, C. J. O., and OSLER, J. A., that title had not been acquired as against the father and his devisees.

Per BURTON, and MACLENNAN, JJ. A. The execution and registration of the discharge gave, in any event, a new starting point for the statute.

Judgment of the Chancery Division, 27 O. R. 93, reversed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 27 O. R. 93.

The question was whether, under the circumstances shortly stated in the head-note, and more fully stated in the report below, a title by possession had been acquired.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 12th of March, 1896.

Watson, Q. C., and *L. M. Hayes*, for the appellants.

E. B. Edwards, for the respondents.

In addition to the cases cited below, *Heward* v. *O'Donohoe*, 19 S. C. R. 341, and *Irish Land Commission* v. *Grant*, 10 App. Cas. 14, were referred to.

Judgment.

HAGARTY, C.J.O.

June 30th, 1896. HAGARTY, C. J. O.:—

The plaintiffs are the executors of their father, David Henderson. The defendant is the widow and devisee of Robert Henderson, a deceased brother of the plaintiffs. The case was tried before Street, J., without a jury. The defence was an alleged verbal bargain between the deceased owner of the land and his son Robert; also the Statute of Limitations. The learned trial Judge considered there was no defence under the statute and found against the defendant as to the alleged contract of sale. On application to the Chancery Division, the judgment was directed to be entered for the defendant wholly on the statute, and the plaintiffs appeal. There appears to have been little if any discussion of the defence under the statute at the trial.

I think the learned trial Judge was justified on the evidence in holding that there was no proof of any contract at all between Robert and his father as to what was to be done with the property. That there was, he thinks, an intention that Robert should have the place, but he could find no contract express or implied.

The evidence of the conversation with the old man by the defendant and his brother after Robert's death, the learned Judge says, was not satisfactory to his mind, and it was contradicted in several respects. It would be hard to say what if any specific agreement was made or could possibly be enforced.

It seems that there was some understanding that ultimately Robert would get the farm; that the old man said that he would hold all his property while he lived; that when each of the farms was paid for he would lease or let one to each of his sons at a rent of about $100 per year, or that they should each pay to him and his wife, if surviving, an annuity of $100 a year.

When Robert was dying, he said he had nothing to bequeath, that everything belonged to his father, etc. On the whole I think there was no contract or bargain shewn

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which any Court could direct to be performed, or of any performance under any contract.

As to the defence under the statute, we may all join in the regret that Robert Henderson's family has not had the benefit of ownership in this land. A judgment in their favour would be desirable on general grounds. But I feel much difficulty in holding that title has been acquired by occupation and the legal title ousted.

It seems clear on the evidence how Robert went to live on this land. The father had several sons. He had just bought this land about ten miles from his own homestead. He had given a large mortgage for a portion of the purchase money. He had a consultation with the sons. They had much discussion on the subject. He said that he must have the deed of the place in his own name, as he wanted to keep possession of all his property as long as he lived. He then said, "Let Bob go on and see how he will get along."

It was sworn that the expressed understanding then was that after paying running expenses the proceeds of the farm should be applied to paying off the mortgage or be handed over to the father for that purpose. Robert was present and appears not to have raised any objection. One of the sons (James) said that Robert was sent down to work the place for the father. Robert was then unmarried. Two of the daughters (his sisters) went down with him to keep house, and all the brothers assisted in moving the necessary farming implements, household furniture, etc., etc., all belonging to the father.

Robert farmed the place, the sisters kept the house, etc., in the usual farming way. Two or three years after, Robert married the defendant. The father was down there "frequently during the summer" for some summers, sometimes stopping two or three weeks. He was not visiting there so much after the marriage.

Then the sisters appear to have returned home. Robert continued making payments out of the produce of the farm, over and above what they called "running

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expenses," and all these payments were applied towards paying off the mortgage. This is very clearly proved. Altogether the payments amounted to about $1,800.

It seems the brothers, from time to time, exchanged work, going down to work with Robert, and he coming up and working for or with them.

These payments were made from time to time, some of them (if not all) clearly within the alleged bar of ten years.

My learned brother Street, at the trial, held that the defence as to the statute failed. We have not the advantage of any reasons given by him on this head. But I assume that he was satisfied that there was no such possession as would oust the legal title in the father.

I am authorized by him to state that he considered, in deciding against the statute, that the entry by Robert on the land and his visible possession was as agent or caretaker for his father, and not as claiming or acquiring any estate therein.

The majority of the Divisional Court Judges held that the statute was a bar.

There is no dispute as to the general principle of law governing the case, that, granted an entry as tenant at will, the statute will begin to run at the end of one year from the entry, unless the tenancy be determined or a new tenancy created.

My difficulty has been that I cannot understand, on the evidence, how or when Robert acquired any estate in the land as tenant at will, or otherwise, to set the statute running. I have already stated the family arrangement under which he went on to the land. I consider it is the correct result of the evidence that he went there as the agent, caretaker, or bailiff, for, or on behalf of, his father, and for the declared purpose of paying off the existing mortgage out of all that the land would produce over and above the maintenance and support of Robert.

Such an arrangement could be made with any ordinary agent or manager; he would live in the house, work the

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HAGARTY, C.J.O.

farm, feed and clothe his family if he had one, and be trusted by the owner to pay to him direct, or to the mortgagee, all the surplus moneys realized from the crops or increase of the stock.

I can refer to the well-known case of *Ryan* v. *Ryan*, 29 C. P. 446; 4 A. R. 563; 5 S. C. R. 387, tried originally before myself, then before this Court and ultimately decided by the Supreme Court. It was held that, under the circumstances, the man setting up title by possession against his father was in such apparent possession merely as caretaker, bailiff, or agent. I think the peculiar circumstances here in evidence point even more clearly to such a conclusion than in *Ryan* v. *Ryan*.

As already stated, there is no doubt but that he expected ultimately to obtain the land from his father, at all events when the united efforts of the family had paid off the mortgage.

The father used, every summer, to pay occasional visits to his son, staying sometimes there for weeks, "walking around," as one of the witnesses says. It seems to me that at such times the old man was on his own land, in his own legal right. It is quite true that he did not then enter on it *animo possidendi*.

The circumstances would not call for any technical proceeding of that kind. The language of Erle, C.J., in *White* v. *Bailey*, 30 L. J. C. P. 253, although used in a very different kind of case is worth quoting.

"The distinction is extremely important between granting an estate to a person, and the case where the owner of the premises places him in the premises for the purpose of enabling him to perform the duty which he is employed to do. In the latter case he has no estate."

Here the object may be considered as two-fold: first, to raise a fund to pay off the encumbrance. Second, to give employment to Robert to cultivate the land for his father, receiving thereout enough for his support. All this would be consistent with his occupation being wholly as his father's agent or caretaker, or servant.

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HAGARTY, C.J.O.

The father had several farms, and his intention, apparently, was to hold all in his own name and control until paid for and until his death. Robert's death may probably have defeated his intention as to this land.

I have not overlooked the point suggested by my brother Maclennan, as to the effect on the operation of the Statute of Limitations, of the payment off of the mortgage, and the release or statutable discharge thereof and thereby the creation of a fresh title in the mortgagor. I decide this case on the other ground, and without further discussing the view of my learned brother; but I must not be understood as expressing an opinion thereon. The point may necessarily arise in future litigation, and is worthy of the most careful consideration.

BURTON, J. A. :—

I think, for the reasons given by my brother Maclennan, whose judgment I have had an opportunity of reading, that this appeal must be allowed.

OSLER, J. A. :—

I agree with the judgment just read by the learned Chief Justice. I express no opinion as to the effect of the execution and registration of the discharge.

MACLENNAN, J. A. :—

The learned Judges of the Divisional Court have decided this case on the Statute of Limitations, but they have done so apparently without the effect of the outstanding mortgage having been called to their attention. I agree that, putting aside the effect of the mortgage, the statutory period had run against the plaintiffs before action. The father had acquired the land by conveyance dated the 31st March, 1881, and on the same day he made a mortgage in fee for a balance of the purchase money, payable in six years with

annual interest, but with the privilege of paying $100 or any multiple thereof on account of the principal money at any time. Judgment. MACLENNAN, J.A.

The mortgage was for $3,600, and payments were made from time to time until the 30th of March, 1886, when the balance then remaining due, $1,200, was paid, the money for the purpose having been borrowed upon a joint promissory note made by the father and his son Robert. A statutory discharge of the mortgage was executed on that day, acknowledging payment by the father, and it was registered the same day. It is admitted that about $1,800 in all was contributed by Robert towards payment of the mortgage, the remainder having been paid by the father.

Robert entered into possession soon after the purchase, namely, in the month of April, 1881, and treating him as a tenant at will, the statute would have commenced to run in the month of April, 1882. The action was brought on the 13th of August, 1894. Upon the foregoing state of facts, if we assume the statute to have been running against the father from April, 1882, it clearly had not run out on the 30th of March, 1886, when the mortgage was paid off and the discharge registered. The father was still the owner of the land subject to the mortgage, and when the discharge was registered it operated, under the statute, to revest the legal title in the father upon that day, which was within ten years next before the commencement of the action. Although the statute was running in favour of Robert, not only against the father, but also against the mortgagee, it is clear that as against the mortgagee each successive payment upon the mortgage made a new starting point, the last of which was on the 30th of March, 1886, and it is clear that Robert could not have acquired title against the mortgagee until ten years afterwards. The question then arises whether the father did not, upon getting back the legal estate from the mortgagee, stand in the same position as regards the statute as the mortgagee. The precise point seems never to have been decided. In *Doe d. Baddeley*

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v. *Massey*, 17 Q. B. 373, it was decided that a person who pays a mortgage debt and at the same time gets a conveyance both from the mortgagor and the mortgagee is within the English enactment corresponding to section 22 of our Limitation Act, R. S. O. ch. 111, which declares that any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover the land within ten years next after the last payment of any part of the principal money or interest, although more than ten years have elapsed since the time at which the right to do so first accrued. Upon this case it is remarked, in the last edition (2nd) of Darby and Bosanquet on Limitations, p. 460, that it is not clear that the interest so acquired from the mortgagor stands on the same footing as that acquired from the mortgagee. It is also (p. 461) suggested as a question whether a mortgagor who redeems after he has been long dispossessed would acquire anything more than the mortgagee's interest. So in Banning on Limitations, 2nd ed., p. 168, it is said that a question may be raised whether a person who has gained title by possession against the mortgagor but not against the mortgagee has not acquired the equity of redemption.

In *Doe d. Palmer* v. *Eyre*, 17 Q. B. 366, which was an ejectment by the assignee of a mortgage brought after time had run against the mortgagor in favour of the defendant, Lord Campbell appears to have thought that the right of entry which was preserved to the mortgagee by the payment of interest within the statutory period would enure to the benefit of the mortgagor. He says at pp. 372-3: "A case may be put, where a person who has occupied as tenant by sufferance nearly twenty years without payment of rent or written acknowledgment might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises and going on, for a great many years, afterwards paying interest to the mortgagee. But it cannot be considered to have been an object of the Legislature to protect the interest of such a person. The mortgagor certainly may, in some cases, gain a consequential advan-

tage by our construction of the statute, although it was passed for the security of mortgagees. Still, without this, the security intended to be given to mortgagees cannot be enjoyed."

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MACLENNAN, J.A.

The case of *Baddeley* v. *Massey*, above referred to, in the same volume, p. 373, was also an ejectment. The defendant had been in possession from 1829 for more than twenty years before action, without payment of rent or acknowledgment to any one. Two mortgages had been made by the owner some years before his possession began. In 1834, after the defendant's possession had continued for about five years, the land was sold to a purchaser, who paid off the mortgages and obtained a conveyance from the owner and the mortgagees, to hold free from the mortgages. After that the land was sold to other persons, and having passed through several subsequent owners, ejectment was brought against the defendant in 1850. It was contended on his behalf that the statute corresponding to our section 22 was inapplicable, inasmuch as the mortgages having been paid off and extinguished long before, the plaintiff was not a person "entitled to or claiming under a mortgage." The judgment of the Court in this case also was given by Lord Campbell, and in doing so he said (p. 381): "The real question here is, whether the lessor of the plaintiff can be considered 'entitled to or claiming under' a mortgage. He is not a mortgagee, nor the assignee of a subsisting mortgage; the mortgage which Wilson had created in 1822 was paid off in 1834, when the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the plaintiff claims. Although he is not entitled to the mortgage, we think that he claims under the mortgage. In no other way can the statute be made effectual for the protection of mortgagees. * * On payment of the mortgage money the mortgage ceases to exist as a security for money; but the person to whom the mortgagee conveys his legal interest claims under the mortgage, although the equity of redemption should likewise be conveyed to him."

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MACLENNAN, J.A.

Ford v. *Ager*, 2 H. & C. 279, was a similar case, the only difference being that the mortgage was made after the time had begun to run against the mortgagor.

Now I think that notwithstanding the doubts expressed by the text writers, the decision in *Doe d. Baddeley* v. *Massey*, 17 Q. B. 373, governs this case. There, as here, the mortgage had ceased to exist by reason of payment long before the defendant could pretend to have acquired any interest by length of possession. There, as here, when the mortgage was paid off the owner's title had become in law a single indivisible thing, just as if there had never been any mortgage at all, and yet it was held that time must be computed from the last payment on the mortgage, not because there was still in any sense a mortgage, but because the plaintiff was a person claiming under a mortgage.

To my mind it is nothing less than absurd to say that after this mortgage was paid off and a discharge registered time was running in favour of Robert Henderson against two titles, that is against the equity of redemption, and against the legal title, and running as from a different date against each. What right had Robert to say that his father had two titles? He had none. There was but one title, and that being under a mortgage, it had the protection of the statute. I think it is impossible to found any distinction on the circumstance that the present was a case of redemption and reconveyance, while the *Baddeley* case was a case of sale to a stranger. The effect upon the title is exactly the same, whether it be the case of payment and reconveyance, release of the equity of redemption, or sale with discharge of the mortgage. In either case the mortgage is gone, and the title has become complete and single once more, and if the statute is applicable to one case it must equally be applicable to the others.

I think the same conclusion follows from other conssi derations. The rights of mortgagor and mortgagee are reciprocal. Upon payment the mortgagor is entitled to redemption, and redemption means having the land back

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just as the mortgagee holds it. If the mortgagee has a right of entry, the mortgagor is entitled to that as well as every other right or interest in or over the land possessed by the mortgagee. Again, what the statute says is that at the end of the period the right or title of the party to the land shall be extinguished. The clause in question has the effect of saving mortgagees' titles from extinction under certain circumstances. But a mortgage involves the right of redemption by the person liable to pay the debt. Therefore, whatever saves the mortgage must equally save the reciprocal inseparable right of redemption. It is said that the effect of the statute in such a case is that the person in possession acquires the equity of redemption. The answer to that is that the equity of redemption had long ceased to exist. The land had been redeemed, and for years no equity of redemption had existed. Another answer is that the right acquired by length of possession is negative, not positive. The statute extinguishes the title of the person who has not exercised his right of entry or action, but it does not transfer that title to the person in possession. Lord St. Leonards has said that the statute in effect executes a conveyance, but in the late case of *Tichborne* v. *Weir*, 8 Times L. R. 713, 67 L. T. N. S. 735, the Court of Appeal decided that such was not its effect, and that when time had run against the owner of a term of years the term did not pass to the person in possession, so as to make him liable under the covenants in the lease. All the Judges there concur in stating that the effect of the statute is simply to bar and extinguish the right of the party out of possession, and not to transfer any title or estate to the party in possession.

The case of *Heath* v. *Pugh*, 6 Q. B. D. 345, affirmed in the House of Lords, *Pugh* v. *Heath*, 7 App. Cas. 235, though different from the present in many respects, has an important bearing in the same direction. There it was held that although a legal mortgagee's right of entry arising from default in payment had long elapsed, a new right arose from a final order of foreclosure, obtained after, but in a

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suit commenced before, the time had run. If it were held that the equity of redemption was barred but not the mortgage, it would follow that after the time had run the mortgagee could compel the mortgagor to pay the mortgage money, and could afterwards eject the person in possession, and keep both the mortgage money and the land. The person in possession would have no defence against the legal title of the mortgagee, and his length of possession had given him no right to redeem. This would be a very startling result indeed.

So I think that, in the present case, when David Henderson redeemed the mortgage and got back his title from the mortgagee, he acquired a new right of entry or action for the recovery of the land, as a person claiming under a mortgage, within section 22 of the statute, and that the defence under the Statute of Limitations must be held to fail.

See also *Hooker* v. *Morrison*, 28 Gr. 369, and *Cameron* v. *Walker*, 19 O. R. 212, the latter a case of a purchaser under a power of sale in a mortgage in whose favour section 22 was held to be applicable.

There remains the question whether there was any agreement between Robert Henderson and his father to support a defence to the action. All the learned Judges in the Court below were of opinion that no sufficient agreement was made out. I have perused the evidence more than once, with an anxious desire, if possible, to find some such agreement, but I have not been able to do so. The father and son being both dead, the evidence of what, if any, agreement there was between them is altogether too vague and shadowy for a Court to act upon, and so I think no effect can be given to it.

The appeal must, therefore, be allowed.

Appeal allowed.

Trusts Corporation of Ontario v. Hood.

Principal and Surety—Assignment of Mortgage—New Mortgage—Reservation of Rights.

A covenant by the assignor of a mortgage with the assignee that the mortgage money shall be duly paid makes the assignor a surety; but he is not discharged merely by the assignee taking a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage; the new mortgage containing a redemise clause, but not being executed by the mortgagee. Judgment of the Common Pleas Division, 27 O. R. 135, affirmed, Osler, J. A., dissenting.

Statement.

This was an appeal by the defendants from the judgment of the Common Pleas Division, reported 27 O. R. 135, and was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ. A., on the 26th and 27th of May, 1896.

The facts and arguments are stated in the report below and in the judgment in this Court.

Osler, Q. C., and *Ball*, Q. C., for the appellants.

Aylesworth, Q. C., for the respondents.

June 30th, 1896. Maclennan, J. A.:—

On the 15th of December, 1874, one Slaght mortgaged a farm to Thos. J. Clarke for $3,500, of which $500 was to be paid in two instalments in one and two years, and the remainder, $3,000, in five years, that is, on the 15th of December, 1879. The mortgage was in the statutory form, with interest payable quarterly, at eight per cent. per annum, and the covenant for payment contained, by interlineation after the word "interest," the words "and interest on all arrears of interest."

On the 25th of January, 1876, Slaght sold and conveyed the land subject to the mortgage to Wood, who covenanted in the deed to pay the mortgage and interest, and to indemnify Slaght. On the 7th of December, 1876, Clarke assigned the mortgage to Hood in the usual form. On the

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9th of May, 1878, Hood assigned the mortgage to McLeod, by deed, also in the usual form, reciting the mortgage and the sum remaining due thereon for principal money and interest, and with a covenant "that the said mortgage money and interest in the said mortgage mentioned shall be duly and regularly paid." The first two instalments of the mortgage money were duly paid, and Wood continued to pay interest at the rate of eight per cent. per annum until the 16th of March, 1881, when he made a new mortgage to McLeod of the same land for $3,000, with interest at six and a half per cent. per annum, payable half-yearly, the principal money to be paid in four years. The mortgage also contained a stipulation that in case of default in payment of interest, it should be compounded every six months, and that the compound interest should be a charge upon the land. There is also a power of distress, and the usual re-demise clause, that until default the mortgagor should have quiet possession. McLeod is dead, and Hood is dead, and this action is by McLeod's executor against the executors of Hood's estate, upon the covenant contained in the assignment of the 9th May, 1878.

At the trial the defendants contended that Hood was a surety, and was discharged by the taking of the new mortgage from Wood by McLeod. It was answered that if Hood was a surety, McLeod had in taking the new mortgage reserved his rights and remedies upon the old mortgage by a parol agreement or understanding with Wood. The learned Chief Justice of the Queen's Bench Division, who tried the action, dismissed it on the ground that the surety was discharged. That judgment was reversed by a Divisional Court, which held that although Hood was a surety there had been a parol reservation of remedies, and that the defendants were liable.

The present appeal is from that judgment. The new mortgage makes no reference at all to the old one, and it is expressed to be in consideration of $3,000 advanced by McLeod to Wood. The evidence of the circumstances under which it was made is that of Wood, who says that

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he applied to McLeod to reduce the interest, and that he agreed to do so, upon getting a new mortgage, but refused to give up the old mortgage, because he intended to hold on to Hood, that he wanted to hold Hood for the deficiency. He does not explain whether that meant deficiency between six and a half per cent. and eight per cent. interest or the ultimate deficiency of the mortgage debt upon realising the security. The effect of the evidence, however, is that Hood acquiesced in McLeod's refusal to give up the Slaght mortgage, and in effect, as found by the Divisional Court, agreed that the new mortgage should not operate as a satisfaction of the mortgage from Slaght.

The first question which arises is whether Hood was a surety. It was argued very strenuously by Mr. Aylesworth that he was not, that his covenant was an independent covenant, and that he was liable as a principal and not as a surety. On this point I agree entirely with the judgment of the Divisional Court and also of the trial Judge, that Hood was a surety. By the assignment of the mortgage debt to McLeod, Slaght became, by virtue of the Act relating to the assignment of choses in action, debtor to McLeod, and when Hood covenanted with McLeod that that debt would be duly and regularly paid, Hood became the plainest kind of a surety. The covenant that the debt would be paid, plainly meant, paid by the debtor, and if there is a debt and a third person binds himself to the creditor to pay it, and if as between the debtor and such third person the former is still the person who ought to pay, then, as I understand the law, the latter is a surety. The present case fulfils all these conditions, and Hood was therefore a surety to McLeod for the payment of Slaght's debt.

In order to determine the further question whether the surety was discharged by the taking of the new mortgage it is necessary to examine the legal relations of the parties when it was taken. When Hood assigned the mortgage to McLeod it was not yet due, and Hood's covenant, therefore, meant that the interest would be paid quarterly at

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eight per cent. per annum, and that the principal money would be paid on the 15th of December, 1879. That was Slaght's obligation, and that is what Hood covenanted would be done. The mortgage not only stipulated for interest at eight per cent. quarterly, but also that interest would be paid on all arrears of interest. Upon the authority of *St. John* v. *Rykert*, 10 S. C. R. 278, the covenant for the payment of interest did not extend beyond the maturity of the mortgage, and the same must be true of the covenant for interest upon interest; and therefore, after the 15th of December, 1879, the only interest which could be recovered from Slaght was simple interest at six per cent. It is true that Hood went on paying at eight per cent. until the 16th of March, 1881, but he was not liable to do so, and his payments beyond six per cent. up to that time were voluntary. At the time of the taking of the new mortgage, the old mortgage was overdue, and was therefore only bearing interest at the rate of six per cent. per annum, simple interest. That is all that could be recovered by law from Slaght, and that is all that Hood, the surety, was liable for. It follows that in a foreclosure or redemption suit no more could be recovered from Wood, the owner of the land. The situation, therefore, when the new mortgage was taken was that Slaght was the principal debtor. Hood was surety and McLeod was the creditor. McLeod had, besides the liability of the principal debtor and the surety, the further security of the land. The land, however, was Wood's land, and Wood was not a debtor at all. He had a right to pay the debt, in order to redeem his land, but he was not liable to McLeod. Wood had covenanted with Slaght to pay the mortgage, and to indemnify him against it, but that did not make him liable to McLeod; that was a matter between himself and Slaght. At that moment McLeod could have sued Slaght, and he could also have sued Hood, but he could not have sued Wood. He could only have brought an ejectment or a foreclosure suit against Wood, and while he could eject or foreclose him, if he did not pay, he could not compel him to pay. If he sued Hood

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and made him pay, Hood could claim an assignment of the mortgage, and could eject or foreclose Wood, but neither could Hood compel Wood to pay unless he chose to do so. The only person who could sue Wood was Slaght, upon his covenant to pay the mortgage and to indemnify him against it. Such being the situation, it is evident that although Hood was a surety, he was not a surety for Wood, for Wood was no debtor at all; and I see no reason why McLeod could not have taken a covenant from Wood for the debt payable at any time and at any rate of interest he might choose to agree upon, just as he could from any stranger, without in any way affecting his rights or remedies against Hood. The only way in which Hood could be affected, was in case McLeod had dealt with the land to his prejudice as surety. Hood's right as surety was upon payment of the debt to have an assignment of the mortgage debt, and of the land, so that he might indemnify himself by action against Slaght, or by ejectment or foreclosure against Wood. The new mortgage did not impair the right of action against Slaght; no extension of time had been given to him, and his covenant remained in full force, so that if Wood redeemed he could at once sue Slaght just as if the new mortgage had never been taken. Unless, therefore, the surety's right to bring ejectment or to foreclose the mortgage was impaired by the new mortgage, there is no ground on which he can claim to be discharged.

But Mr. Osler contended that the re-demise clause in the new mortgage gave Wood a right against all the world to undisturbed possession of the mortgaged land until default, and that upon payment of interest as stipulated therein, he could neither be ejected nor foreclosed for four years. If that is so, it must be held that the surety's position has been changed and impaired, and that he is no longer liable. What, then, was the effect of the new mortgage as a dealing with the land, and apart altogether from the debt, and disregarding for the present the parol agreement? McLeod had the legal title already under the

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old mortgage, and Wood was tenant at sufferance, for the mortgage was overdue. The grant of the land, therefore, had practically no effect; it left the rights of the parties exactly where they were before. What then was the effect of the re-demise? It has long been settled law that a re-demise such as is contained in this mortgage vests in the mortgagor a term in the land until default: *Ford* v. *Jones*, 12 C. P. 358, and other cases following *Wilkinson* v. *Hall*, 3 Bing. N. C. 508, and such a term undoubtedly passed to Wood. Unless, therefore, the parol understanding between the parties either had the effect of neutralizing that part of the deed so that no term passed at all, or estops Wood from setting up the term against an ejectment or foreclosure, it must be an effectual defence to Wood against either ejectment or foreclosure, whether brought by McLeod himself or by Hood, the surety, after payment. No authority has been cited to us, and I know of none, deciding that the grant by deed of an interest in land can be qualified or rendered nugatory by a contemporaneous parol agreement, such as was proved in the present case. It may be that such a result could be obtained by some stipulation in the deed itself, and that thereby Wood could have estopped himself from setting up the term as against the old mortgage in an action brought under it by Hood as surety; but I am unable to see how the parol agreement which has been proved, or any parol agreement whatever, could be set up for that purpose. If set up it would be to contradict the deed and to render it inoperative. It is not like the collateral agreements in *Morgan* v. *Griffith*, L. R. 6 Exch. 70, and *Erskine* v. *Adeane*, L. R. 8 Ch. 756, which did not contradict the deeds of the parties, but allowed them in each case to have their full effect.

I had written thus far when my attention was called to the fact, which I think was not noticed during the argument, that McLeod did not execute the new mortgage. Upon the best consideration I have been able to give to the case, I think that relieves the plaintiffs from all difficulty. No doubt if McLeod were suing Wood for posses-

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sion upon the new mortgage before default, he would fail on equitable grounds, notwithstanding that he had not executed it: *Burnett* v. *Lynch*, 5 B. & C. 589. But unless and until he did execute it no term would be vested in Wood, which he could set up against the old mortgage: *Doe Roylance* v. *Lightfoot*, 8 M. & W. 564, 565; *Witham* v. *Vane*, 44 L. T. N. S. 718.

The case of *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. C. 483, leaves it doubtful whether, without execution by the mortgagee, such a re-demise clause as the present would create even a tenancy at will, but it seems to shew that it could do no more. But however that may be, I think the parol agreement that the new mortgage was to be merely collateral to the old would estop Wood from setting up any defence either legal or equitable to an action of ejectment on the old mortgage by either McLeod or Hood, and that therefore the rights of the latter as surety have not in any respect been impaired.

I am therefore of opinion that the appeal fails and that the plaintiffs are entitled to judgment for the balance of the mortgage debt, with simple interest at six per cent. per annum.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

OSLER, J. A.:—

I have come to a different conclusion, but it is not necessary to give my reasons at length, as I agree with those of the learned trial Judge, ARMOUR, C. J. I agree that Hood was a surety, but I think, looking at all the circumstances, that he was discharged.

Appeal dismissed, OSLER, J. A., *dissenting*.

Smith v. Township of Ancaster.

Municipal Corporations—Way—Toll—Roads.

Statement. This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 27 O. R. 276, and was argued before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ. A., on the 2nd and 3rd of June, 1896.

G. Lynch-Staunton, for the appellant.
W. Cassels, Q. C., for the respondents.

The appellant's counsel stated that the toll-gate in question had been moved to a point within the township of Ancaster, and asked to have the judgment of Robertson, J., fixing the rate of toll, restored.

June 30th, 1896. The Court held that the appellant had obtained by the judgment appealed from full relief in respect of the one toll-gate attacked, and dismissed the appeal with costs.

ROGERS V. TORONTO PUBLIC SCHOOL BOARD.

Negligence—Unsafe Premises—Volunteer.

A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in a reasonably safe condition, but one who visits them for his own purposes and without the knowledge of the occupant, does so at his own peril.

The superintendent of a coal company, before the time arranged for delivery, without the knowledge of the defendants, went to a school-house to look at the coal-bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar:—

Held, reversing the judgment at the trial, that he could not recover damages.

Statement.

THIS was an appeal by the defendants from the judgment for the plaintiffs at the trial.

The action was brought by Benjamin Rogers to recover damages for injuries sustained by him by falling into an unguarded furnace pit in the cellar of one of the Toronto public schools. Rogers was employed by the Rogers Coal Company, who had a contract with the defendants to deliver coal to the schools. At the request of the company, the defendants agreed to accept delivery at the school in question, on the 16th of July, 1894, of a large quantity of coal. Rogers, whose duty it was to see to the delivery of the coal, without any instructions from his employers, and without the knowledge or request of the defendants, went to the school on the evening of the 15th of July, wishing to see where the coal-bins were, so as to make his arrangements for delivery the next day. The caretaker of the school was sick, but on Rogers stating what he wanted, a friend of the caretaker, who was present, volunteered to shew Rogers the coal-bins. They then went to the cellar, and Rogers slipped and was severely hurt.

The plaintiff died before the trial, though not directly as a result of the accident, and the action was revived by his executors, and was tried at Toronto, on the 16th and 17th of January, 1896, before ARMOUR, C. J., and a jury, when

Statement. a verdict was given in the plaintiff's favour for $5,700, and judgment was entered for this sum and costs.

In that portion of his charge to the jury relating to the deceased's presence on the defendant's premises, the learned Chief Justice in effect told them that the deceased was on the premises either as a trespasser, in which case the plaintiffs could not recover, or by the invitation of the defendants; and that if he were at the time of the accident on the premises in and about the reasonable performance of the contract, he would be there by the defendants' implied invitation, and that if so they owed him the duty of having the premises in a safe condition, and if unsafe the further duty of warning him of their condition: and amongst other matters he left it to the jury to say whether the deceased was acting reasonably in the performance of the contract in going to inspect the place.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th of June, 1896.

Robinson, Q. C., and *F. E. Hodgins*, for the appellants. Rogers went to the building entirely for his own purposes, and the defendants were under no obligation to have the building in any particular condition: Beven's Law of Negligence, 2nd ed., p. 532. In *Indermaur* v. *Dames*, L. R. 2 C. P. 311, there was a definite appointment for a particular day; and in *Holmes* v. *North Eastern R. W. Co.*, L. R. 4 Ex. 254; L. R. 6 Ex. 123, there was tacit assent to the use of the defective platform: see *Chapman* v. *Rothwell*, E. B. & E. 168; *Wilkinson* v. *Fairrie*, 1 H. & C. 633; *Schmidt* v. *Town of Berlin*, 26 O. R. 54. [The learned counsel then dealt with defences specially applicable to the defendants.]

Osler, Q. C., and *H. S. Osler*, for the respondents. The defendants had notice of the dangerous condition of the premises in question, and were bound, as against the deceased, whose business necessitated the visit, to keep them in a safe condition.

Robinson, Q. C., in reply.

June 30th, 1896. BURTON, J. A. :—

Judgment.

BURTON, J.A.

For the reasons I have given in my judgment delivered at this present sitting, in *Township of Logan* v. *Hurlburt*,* and for those referred to in the well-known judgment of Gray, C. J., in *Hill* v. *City of Boston*, 122 Mass. 344, I think it would have been very difficult to maintain this action against the defendants for a mere non-feasance ; but I think the foundation of such an action is displaced when it appears that the deceased was not upon the premises upon any invitation of the defendants express or implied.

It is clear law that a person going upon business which concerns the defendant, and upon his invitation express or implied, using reasonable care on his own part, for his own safety, is entitled to expect that the occupier of the premises shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know, exists. Assuming that the defendants may, for the present argument, be looked upon as the occupiers, how can they be considered as having extended an invitation to the deceased to visit the premises on this occasion ? The contract for delivery of the coal was to be carried out on the 16th of the month ; and if when engaged in the delivery the deceased had found the premises in an unsafe condition and injury had resulted, I think that would constitute actionable negligence, but what obligation or duty was there on these defendants towards the contractors or any of their employees to have the premises in a safe condition at this period ?

The enquiry on the part of the deceased, was, I concede, a very reasonable one, and if he had applied to the persons in charge, they would, it is reasonable to assume, have sent some one with him to examine the premises ; but there was no duty on the defendants to keep the premises in good order for a person visiting them for his own information or that of his employers.

The contract was entered into on the 10th of July for the

* See p. 628, post.—REP.

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delivery of the coal in such quantities and at such times as should be directed by the committee, and if the contention of the plaintiffs be correct the defendants were bound to have their premises in a safe condition and free from the danger complained of from that date, until after the delivery of the coal. I think they owed no such duty to the contractors, and that there was no evidence to go to the jury of an invitation to the deceased to visit the premises at the time of the accident; and without discussing the other questions, I think the action fails upon this short ground.

MACLENNAN, J. A.:—

I also am of opinion that the appeal should be allowed, and that the action should be dismissed. I am unable to perceive that there was any duty resting upon the school board to have their premises in any particular condition for the safety and protection of the deceased at the time when the unfortunate accident occurred. He chose to enter the building at a time when neither the defendants nor any one in their employment had any reason to expect him, and when there was no one present with authority to permit him to enter. His entry into the building was a purely voluntary act on his part, without any invitation of any kind from the defendants, or from any one on their behalf; and that being so, there was no breach of duty, and consequently no negligence by reason of which they can be held responsible for the accident.

The appeal should be allowed, and the action should be dismissed.

HAGARTY, C. J. O., and OSLER, J. A., concurred.

Appeal allowed.

BROUGHTON V. TOWNSHIP OF GREY.

Municipal Corporations—Drainage By-laws—Initiating Township—Contributing Township.

Statement.

THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 26 O. R. 694, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 8th of June, 1896.

J. P. Mabee, for the appellant.
Garrow, Q. C., for the township of Grey.
G. G. McPherson, for the township of Elma.

June 30th, 1896. The appeal was dismissed with costs, the members of the Court being divided in opinion, HAGARTY, C. J. O., and OSLER, J. A., thinking that the appeal should be allowed, and BURTON, and MACLENNAN, JJ. A., that it should be dismissed.

JAMIESON v. LONDON AND CANADIAN LOAN AND AGENCY COMPANY.

Landlord and Tenant—Lease—Mortgage of Lease—Assignee of Term.

A mortgage of lease, after reciting the lease, granted and mortgaged to the mortgagees (a loan company), their successors and assigns forever, the lease and the benefit of all covenants therein contained, and all that parcel of land (describing it), *habendum* unto the mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the lease, less one day thereof, and all renewals and substituted estates and right of renewal and other interests of the mortgagor :—

Held, that the premises did not grant any estate or interest, and the *habendum* was not void as repugnant ; that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent.

Judgment of ROBERTSON, J., reversed.

Statement. THIS was an appeal by the defendants from the judgment of ROBERTSON, J.

The plaintiff on the 1st of January, 1889, by lease made in pursuance of the Act respecting Short Forms of Leases, demised to one Armstrong certain lands in the city of Toronto, for a term of twenty-one years, at the yearly rent of $1,400, payable in equal half-yearly payments of $700 each in advance, and there was a covenant on the part of the lessor at the end of the term, or of any renewal or renewals thereof, to grant a renewal lease for a further term of twenty-one years, on certain specified terms ; and there were covenants by the lessee to pay rent and not to assign, set over or sub-let, without the consent in writing of the lessor.

On the 22nd of March, 1889, the lessee, "in pursuance of the Act respecting Short Forms of Mortgages," granted and mortgaged unto the defendants, their successors and assigns forever, all and singular the said indenture of lease, and the benefit of all covenants and agreements therein contained, and all that certain parcel or tract of land and premises (describing the demised lands) to secure the repayment of $4,000, *habendum* unto the mortgagees, their successors and assigns, for the residue yet to come

and unexpired of the term of years created by the said lease, less one day thereof, and all renewals and substituted estates and rights of renewal and other interests of the mortgagor. Statement.

On the 27th of February, 1891, the lessee made in favour of the defendants another mortgage in the same form, to secure a further sum of $1,500, *habendum* in the same form, except that the word "successors" was omitted before the word "assigns."

In each of the mortgages the particulars of the lease were given in recitals. The mortgages also contained covenants on the part of the mortgagor to perform and keep the covenants in the lease, or any renewals thereof, so long as any money should remain due on the security, and they provided that in case the mortgagor should refuse or neglect to renew the lease, or any renewal thereof, then that it should be lawful for the mortgagees, if they thought proper, to effect such renewal in their own name, and that in that case, every such new lease and the premises thereby to be demised should remain and be a security to the mortgagees, as well for all moneys paid by them for such renewal and their costs and charges, as for any other sums that might be due by virtue of said mortgages, and for such purposes the mortgagor appointed the mortgagees "his lawful attorneys irrevocable, to procure such renewal in his or their name, as to the mortgagees may seem meet." There was also a proviso that the power of sale contained in the mortgage (which was that on default of payment for two months, the mortgagees might enter and sell the land) should extend and apply, not only to the premises thereby expressed to be granted or assigned, but also to those which might be comprised in any such renewal with the benefit of the covenant for renewal contained in the present or then subsisting lease thereof, as the case might be; and the mortgagor attorned to, and became tenant at will to the mortgagees, subject to the proviso. There was no covenant by the mortgagor that in case of sale under the power, he would convey to the purchasers the one day reserved.

Statement.

On the day of the date of each of the mortgages the plaintiff consented in writing under seal to the mortgages "by way of assignment."

Subsequently, the mortgagor having made default, the defendants entered into possession of the property, and paid to the plaintiff rent from the 1st of January, 1893, to the 1st of July, 1894, by cheques, each cheque stating that the amount mentioned was for "ground rent *re* Armstrong."

Armstrong made an assignment for the benefit of creditors, and for the rent due on the 1st of January, 1895, the defendants sent to the plaintiff a cheque of the assignee, they having, however, supplied the funds. This cheque the plaintiff refused to accept, except as a payment from the defendants themselves, and some correspondence ensued between the solicitors for the parties, the plaintiff's solicitors contending that the defendants were assignees of the term, and for the rent due on the 1st of July, 1895, this action was brought.

The action was tried at Toronto, before ROBERTSON, J., who, on the 2nd of January, 1896, gave the following judgment in the plaintiff's favour:

ROBERTSON, J.:—(After stating the facts.)

The question involved in this case is whether the mortgagor has granted to the defendants the residue of the term of twenty-one years demised to him by the plaintiff, or, whether the indenture of mortgage assigns only a part of said term. Taking the words of the grant, or what is called in law the "premises" by themselves, there is no doubt the whole of the term is assigned, but the words employed in the *habendum*, it is contended by the defendants, limit or control the premises so as to create a grant only of the residue of the term "less one day thereof." The case has been very fully and very ably argued on both sides, and many cases pro and con have

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been referred to, all of which I have most carefully considered, and, while I have come to a conclusion in regard to the question, I cannot say that I am entirely free from doubt; one has to go back to first principles in order to fully understand what the law really is.

In the first place, the mortgage recites the lease, setting out that the term demised is of twenty-one years from the 1st of January, 1889, subject to the rents, covenants and conditions therein reserved and contained, "and with the right of renewal therein contained;" and the grant is unto the mortgagees, their successors and assigns forever, of "all and singular the said indenture of lease and the benefit of all covenants or agreements therein contained, and all that parcel or tract of land and premises situate, lying, etc., together with all and singular the engines and boilers which now are or shall at any time hereafter be brought upon, etc., all of which engines, etc., are hereby declared to be and form part of the said leasehold premises hereby granted, etc., or intended so to be and form part of the term hereby granted and mortgaged."

Now, taking the premises, there is no exception. The grant is of the lease, and the benefit of all covenants, etc., therein contained, and the land demised, etc., which includes the residue of the term. The *habendum*, however, seeks to abridge or cut this down, and to make it for the residue of the term "less one day." On this state of facts I think the *habendum*, being repugnant to the grant, is void. The very old case of *Germain* v. *Orchard*, 1 Salk. 346, is exactly in point. There a lessee for 1,000 years, by deed reciting the original lease of the lands, grants the lands, together with the lease, to the grantee, his executors, administrators and assigns, and all writings relating to the premises: *habendum*, to the grantee, his executors, etc., after the death of the grantor for the residue of the term. The Court of Exchequer Chamber held that by the grant of the lands in the premises to the grantee, his executors, etc., the whole term of 1,000 years was transferred, and, since by the premises the whole term passed

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presently, but, by the *habendum*, not till after the death of the grantor, *ex consequenti* the *habendum* was repugnant to the premises, and void. And the judgment was afterwards affirmed in the House of Peers. See also *Lilley* v. *Whitney*, Dyer 272*a*, and *Welcden* v. *Elkington*, Plowden 520. Leith, in his 2nd edition of Blackstone, at p. 333, states that the office of the *habendum* is properly to determine what estate or interest is granted by the deed, though this may be performed, and now usually is performed in the premises, in which case the *habendum* may lessen, enlarge, explain or qualify, but not totally contradict, or be repugnant to, the estate granted in the premises, and he suggests several cases by way of illustration, and among those he puts a case such as this:—The grant in the premises is to "A. and his heirs"—*habendum* "to him for life"—the *habendum* would be totally void, for an estate of inheritance is vested in him before the *habendum* comes and shall not afterwards be taken away or divested by it. And for this there is also the rule of law, that in the construction of a deed, where one clause is inconsistent with another, the first shall prevail, being the reverse of the rule regarding wills. Now, here we have by the premises a grant of the whole or the residue of the term, and, without the *habendum*, that would be good; in other words, the *habendum* is unnecessary, but in this it seeks to abridge the estate expressed in the premises, that is, the thing granted is cut down to an estate less than what is conveyed by the grant; it is, therefore, inconsistent. A grant in the premises for life, *habendum* in fee, will convey the fee, for it is also the rule in law that a deed, if capable of two interpretations, is to be taken most strongly against the grantor, and therefore the grantee would take the larger estate.

Under a conveyance to A., her heirs and assigns, *habendum*, to A., her heirs and assigns, and, in case of her decease, leaving issue, then in trust to O. (her husband), his heirs and assigns, to and for the benefit of the said children, their heirs and assigns, to be sold for their bene-

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fit, if the said O., his heirs or assigns should think fit; and if the said A. should not survive the said O., leaving no issue, then to the said O., his heirs and assigns forever. Held, that the *habendum*, being inconsistent with the premises, the premises must govern, and that A. took a fee: *Owston* v. *Williams*, 16 U. C. R. 405, in which Sir John B. Robinson, C. J., in delivering the judgment of the Court, at p. 407, says: "But no doubt it has been a rule very early laid down, that a deed is to be construed most strongly against the grantor, and that, when he has by the premises in the deed, most plainly granted an estate to A. and his heirs, he cannot retract that disposition by using words in the *habendum* utterly inconsistent with the grant of such an estate."

In *Goodtitle* v. *Gibbs*, 5 B. & C., at p. 717, Abbott, C. J., who delivered the judgment of the Court, said: "If an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises." The same learned Chief Justice refers to *Germain* v. *Orchard*, in which he says the ground of the reversal was "that the entire residue of the term passed by the premises of the deed, and the *habendum* was void."

Mr. Challis, in his admirable work on Real Property 2nd ed., at p. 377, in referring to the relation between the premises of a deed and the *habendum* says: "It must be borne in mind that in early times deeds contained no recitals, and that the premises are deemed to commence with the operative words." And he then says: "A careful examination of the authorities seems to establish the following propositions:—(for the purposes of this case the first proposition is all that is necessary to refer to), viz.: "Effect must be given to every part of the premises, and, therefore, though the *habendum* may enlarge an estate

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expressly contained in the premises, and capable of taking effect, it may not make void any such estate, or abridge any such estate, unless the abridgment is consistent with the expressions contained in the premises," and he cites, *inter alia*, *Germain* v. *Orchard*, 1 Salk. 346; *Carter* v. *Madgwick*, 3 Lev. 339; *Goodtitle* v. *Gibbs*, 5 B. & C. 709, and the comparatively late case of *Bodington* v. *Robinson*, L. R. 10 Ex. 270.

Now, applying the principles laid down in the last mentioned of the cases, which was a grant to J., his executors, administrators and assigns, not naming any term, which is the case now before me (the grant is to the mortgagees, their successors and assigns forever, and the lease is recited shewing that the mortgagor or grantor has under it an unexpired term, which commenced on January 1st, 1889, for 21 years), Cleasby, B., who delivered the judgment of the Court (Bramwell, Cleasby, and Pollock, BB.) says, at p. 273: "It appears to us that the present case is not a case in which there is an implied estate from the grant in the premises, but an express estate with apt words. We are entitled to look at the interest which the grantor had, and it was an estate for life, and proper words of limitation for granting the whole of his estate *in praesenti* assured, viz., to the grantee, his executors, administrators and assigns. It is impossible to say that this is a case in which an estate is only implied in the grantee. The deed, therefore, takes effect upon the estate which the grantee had, and the effect of this is that the defendant who claims under the deed is entitled to succeed." It appeared that R. was tenant for life of a house, etc., of which (subject to his life) he had made two leases, a lease expiring on the 13th of November, 1864, and a lease to J. expiring on the 13th of November, 1874. On the 10th of November, 1864, R. executed a deed by which in consideration of a yearly rent of £50, he granted and leased the property to J., his executors, administrators and assigns; *habendum* from the 13th of November "for the term of R. for the term of his natural life." Held, that this deed was not void on the

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ground that it purported to create an estate *in futuro* after an estate of freehold, as there was in the premises of the instruments an express grant of the life estate *in praesenti*, which was not controlled by the *habendum*.

Mr. Challis then proceeds, at p. 378, and says: "It follows from the above stated proposition that the *habendum* cannot in general abridge any estate contained in the premises, unless such estate either is not expressly contained, or else is not capable of taking effect, because such abridgment would not in general be consistent, in such a case, with the expressions in the premises." Then the learned author goes on to point out that, from an examination of the authorities, all the usually cited cases in which the *habendum* has been held to abridge an estate in the premises are referable to one or the other of two heads, and are divisible into two classes, which he sums up in the two next propositions, at pp. 378 and 379, referring to *Buckler's Case*, 2 Rep. 55; *Hogg* v. *Cross*, Cro. Eliz. 254; Co. Littleton 183*a*; *ibid* 190 (*b*); *Baldwin's Case*, 2 Rep. 23; and then he sums up the whole in these words: "The conclusion seems to follow, in all cases like those above referred to, that in modern assurances by grant, the *habendum*, though it may enlarge, yet may not abridge, any estate previously contained in the premises, unless the estate in the premises arises by mere implication. In strict propriety of speech it should rather be said that the *habendum* only seems to abridge when in fact there is no estate in the premises at all."

Now, here we have, in the first place, a grant of an express estate with appropriate words, not only in the granting part, that is, the premises, but, also, in the *habendum* itself, "for the residue yet to come and unexpired of the term of years created by the said lease, and all renewals, and substituted estates and rights of renewal, etc.," but followed by a limitation in the *habendum*, after the words "the term of years created by the said lease," by "less one day thereof," which is so utterly inconsistent with the premises, that, on the authorities, I think it must be held

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to be void, and the estate granted by the premises must govern.

But it is contended that, if it appears from the instrument itself that the intention of the parties thereto was merely that a part only of the residue of the term should pass, such intention should be carried out, and that such is the case the counsel for the defendants refers to the words in the *habendum*, "less one day thereof," as being conclusive on this point, and as an authority for this he cites *inter alia*, *Strickland* v. *Maxwell*, 2 C. & M. 539. In my judgment the case does not apply. That was an action of trespass to real estate, and the question arose whether the plaintiff had demised the *locus in quo* for more than one year. The *habendum* was "from the 6th of April then next for the term of one year fully to be complete and ended." Most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy for a year, and many of them appeared applicable only to a tenancy determined by a notice to quit. There were, so to speak, no "premises" or granting clause otherwise than the ordinary words of demise of the lands, and the *habendum*, is the only part of a lease which shews or declares the term for which the demise is made; and, as said by Bayley, B., in that case, at p. 549, the *habendum* is the proper place to look to for the purpose of ascertaining what period the parties had in their contemplation in making a lease, because it is generally the office of that part of the deed to fix the time which the lessor grants that the lessee shall enjoy the demised premises. "I agree," he says, "that you may look at other parts of the instrument, and that, if you can see clearly, that it must have been the intention of the parties that the lease should endure for a longer period of time than the *habendum* specifies, the other parts of the lease may control the *habendum*; but, then, it must be very clear from these other parts of the lease, that it could not have been the intention of the parties that the *habendum* should operate according to the words." Then the learned Judge goes on to examine those expressions in

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the lease which seem at first sight to be inconsistent with the words of the *habendum*, and concludes that the *habendum* must govern. But that is not this case. This is not a lease that we are discussing; it is a grant of a term which has already been demised to the grantee, and there are most important parts of the instrument in this case which shew that the intention was otherwise than that expressed in this *habendum*. Besides that, there is the rule of law already referred to, that in the construction of a deed, when one clause is inconsistent with another, the first shall prevail; and on this point, Sir John B. Robinson, C. J., in *Ouston* v. *Williams*, 16 U. C. R. 405, already referred to, says: "It would have seened the most reasonable rule that in grants as well as in wills, or executory written contracts, the Court should be allowed to be governed by the manifest intention of the party executing, to be gathered from the whole instrument, that he should be allowed to explain his intention as he proceeded, and, if, at the end, he left it plain what he intended, that effect should be given to his deed according to his intention when the disposition made by him was such as he had power to make, but no doubt it has been a rule very clearly laid down that a deed is to be construed most strongly against the grantor, and that, when he has by the premises in the deed most plainly granted an estate to A. and his heirs, he cannot retract that disposition by using words in the *habendum* utterly inconsistent with the grant of such an estate." There are other expressions in the deed which to my mind, clearly shew that the mortgagor and mortgagees both intended that the whole estate of the mortgagor should pass; take, for instance, the right of renewal. If the estate conveyed fell short even by one day of the residue of the term, the mortgagees could have no right of renewal; their estate ended before the expiration of the first term. But to shew that the mortgagees should have the right to renew, they take power irrevocable to renew in their own name, or in the name of the mortgagor. I think there is no doubt the mortgagees have the right to compel renewal; if they had

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not the full residue of the term, they would not have such right. This is not a case of subletting; on the contrary, the mortgagees take the whole of the mortgagor's interest, and they require him to attorn to them, but there is no rent reserved.

The defendants also contend that there is no privity of contract between this plaintiff and the defendants; and no doubt, if the whole of the residue of the term did not pass by the mortgage, that would be so, but there is privity of estate of legal possession, that is, if acceptance of the thing assigned by acceptance of the assignment be equivalent to actual entry, which it is; and, besides, there is privity also, for the contract of the lessor, the plaintiff, is with the lessee the mortgagor, and his assigns, and the defendants here are the assigns of the lessee; it is, therefore, a contract between the lessor and the assignee, in this case between the plaintiff and the defendants: *Williams* v. *Bosanquet*, 1 Brod. & B., at p. 263.

On the whole, therefore, I have come to the conclusion that there must be judgment for the plaintiff for the full amount claimed, together with full costs of the action. I have considered the following authorities, besides those already referred to:—*Ex parte Jackson*, 14 Ch. D., at p. 743; *Kearsley* v. *Philips*, 11 Q. B. D., at p. 624; *Smith* v. *Cooke*, [1891] A. C. 297; Addison on Contracts, 5th ed., pp. 588, 589; *Holford* v. *Hatch*, 1 Doug., at p. 186; 2 Sheppard's Touchstone, p. 266; Smith's Real and Personal Property, 2nd ed., p. 666; *Hogg* v. *Brooks*, 15 Q. B. D. 256; *Williamson* v. *Williamson*, L. R. 9 Ch., at p. 732; Leith's Blackstone, 2nd ed., p. 221; *Wood* v. *Fox*, 3 U. C. R. 134; 2 Platt on Leases, p. 81; 2 Smith's Leading Cases, 9th ed., p. 565.

The defendants appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 18th and 19th of March, 1896.

Robinson, Q.C., and *Arnoldi*, Q.C., for the appellants. The judgment below is wrong, both as to the construction

of the mortgage and its effect. It is not a question of repugnancy at all. The granting part is clearly erroneously expressed if the language is strictly read, but taking it fairly and with the recitals and *habendum* the intention is plain enough, and that is to reserve the one day. It is absurd to grant a terminable estate "for ever," and those words may be rejected. The learned Judge relies on *Germain* v. *Orchard*, Skin. 528; 1 Salk. 346; and see S. C., *sub. nom. Jermyn* v. *Orchard*, Shower P. C., 4th ed., 252. But that case is distinguishable. There the reservation was before the grant; here after it. There also there was an attempt to reserve a life estate which is technically a larger estate than the term itself. *Lilley* v. *Whitney*, Dyer 272*a*, also cited, is to the same effect. *Welcden* v. *Elkington*, Plowden 520, 520*a*, deals with the same point. In 9 Bythewood's Conveyancing (Sweet's ed., 1844), p. 84, it is pointed out that *Burton* v. *Barclay*, 5 Moo. & P. 715, overrules these cases, and *Burton* v. *Barclay* applies here. The learned Judge also cites *Boddington* v. *Robinson*, L. R. 10 Ex. 270. This case also turns on the doctrine of trying, if possible, to uphold a deed and of rejecting the *habendum* in order to prevent destruction of the grant. But the *habendum* may well explain and restrict the grant: 2 Preston on Estates, p. 4, and here the *habendum* merely does this. *Strickland* v. *Maxwell*, 2 Cr. & M., at p. 549, is peculiarly applicable as shewing the effect to be given to an explanatory *habendum*. See also *Earl of Derby* v. *Taylor*, 1 East 502. The restrictive clause is the governing one, and everything inconsistent with that restriction should be rejected. There is no other intention possible, and the reservation is in proper form: *Beardman* v. *Wilson*, L. R. 4 C. P. 57; *Pollock* v. *Stacy*, 9 Q. B. 1033. The Short Forms of Leases Act, R. S. O. ch. 106, sec. 3, shews that exceptions are intended, and an exception may be made in any part of the deed: Smith's Real and Personal Property, 6th ed., pp. 742, 745; 1 Davidson's Precedents in Conveyancing, 3rd ed., p. 94. The fact that the lease is renewable makes no difference. It was not necessary to assign the last

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Argument. day to a trustee for the benefit of the mortgagees. The mortgage makes the mortgagees attorneys for purpose of renewal and assigns the covenant to them, and the mortgagor could not impair their rights. See also *Williams* v. *Bosanquet*, 1 Bro. & B. 238; *Holford* v. *Hatch*, 1 Doug. 183; *Hogg* v. *Brooks*, 15 Q. B. D. 256; *Williamson* v. *Williamson*, L. R. 9 Ch. 732; Davidson's Concise Precedents, 15th ed., pp. 204, 206; Beddoe's Law of Mortgage, p. 196; Coote's Law of Mortgages, 5th ed., p. 256; 1 Prideaux's Precedents in Conveyancing, 15th ed., p. 523; 5 Bythewood's Conveyancing, 4th ed., p. 202, note *k*.

Armour, Q. C., and *W. H. Irving*, for the respondent. The mortgages shew that the mortgagees were intended to be assignees, and the lessor's consent, drawn by the mortgagees, refers to the mortgages as assignments. Nothing is left in the mortgagor, and this is done so as to prevent the possibility of the destruction of the security. The form of mortgage by way of sub-lease is not followed: Coote's Law of Mortgages, 5th ed., p. 264; 1 Prideaux's Precedents in Conveyancing, 15th ed., p. 518. In a sub-lease the technical word "demise" is used, and in an assignment the word "assign" is used, and there is also in a sub-lease a declaration of trust of the one day reserved. The mortgagees went into possession and made leases, and paid ground rent, and are now estopped: *Selby* v. *Robinson*, 15 C. P. 370, at p. 374. The attempted exception has properly been held inconsistent and void: *Doe d. Timmis* v. *Steele*, 4 Q. B. 663. *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, governs this case. *Burton* v. *Barclay*, 5 Moo. & P. 715, has been treated as a peculiar case, and is at any rate distinguishable. See also *Doe d. Meyers* v. *Marsh*, 9 U. C. R. 242; *Owston* v. *Williams*, 16 U. C. R. 405; *Reid* v. *Fairbanks*, 13 C. B. 692; *Howard* v. *Earl of Shrewsbury*, L. R. 17 Eq. 378, at p. 394; *Smith* v. *Cooke*, [1891] A. C. 297; Challis's Real Property, 2nd ed., p. 377.

Robinson, Q. C., in reply.

June 30th, 1896. HAGARTY, C. J. O. :—

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HAGARTY, C.J.O.

It is necessary to consider whether, apart from the *habendum*, there is an estate and interest expressly granted in the premises of this mortgage deed. If there be not, then the grantee will take nothing except by implication of law. If an *habendum* follow the intention as to the estate to be conveyed, that intention will be found in the *habendum*, and consequently no implication or presumption of law can be made; and if the implication so expressed be contrary to rules of law, the intention cannot take effect and the deed will be void.

"On the other hand," in Chief Justice Abbott's language (*Goodtitle* v. *Gibbs*, 5 B. & C. 709, at p. 717), "if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises."

In the present case the deed recites the lease to the mortgagor and the demise of the lands for twenty-one years from the named date, subject to the rents and with the rights of renewal therein contained, then, in consideration, etc., the mortgagor doth grant and mortgage unto the mortgagees and their successors and assigns for ever all and singular the said lease and benefit of covenants therein contained, and the lands—describing them—with certain boilers and machinery which now are or are hereafter at any time brought or placed on said premises, and which are hereby declared to be and form part of the leasehold premises hereby granted and mortgaged or intended so to be and to be and form part of the term hereby granted and mortgaged.

Here we find that the lease as therein described, the lands therein, and the engines, etc., thereon, declared to

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form part of the term hereby granted and mortgaged, all are assigned.

It seems difficult to hold that there is not here an express grant of lease lands and term. I hardly think that the grant of all these is merely on an implication or presumption of law.

Chief Justice Abbott discusses *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, adopting its law. The language there used was in substance not stronger than in this case as shewing an express grant.

The grantor there for consideration of affection, etc., granted, assigned and set over to the defendant, her executors, administrators and assigns, the cottage, barn and lands, and all the premises before recited or mentioned, together with the lease and writings touching the same.

The Chief Justice quotes these words as shewing that the entire residue of the term passed by the premises, and that the *habendum* was void.

If the *habendum* here had been omitted, there would have been clearly a good grant and mortgage of the whole term.

Most of the cases shew a desire to uphold the instrument and to prevent some restriction in an *habendum* defeating or avoiding the estate granted.

Here the object is to cut down the subject matter granted by the words of the *habendum*.

If there was no express grant of the term, then the defendants claim the right to resort to the one day restriction in the *habendum*.

We may also refer to *Bodington* v. *Robinson*, L. R. 10 Ex. 270, on the general doctrine as to express or implied grants. I do not think anything turns on the words here used granting to the corporation, their successors and assigns. The grantees take in their continuing corporate capacity, which the law assumes will continue. The words "successors and assigns," though unnecessary, ought to be as significant as "executors, administrators and assigns."

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HAGARTY, C.J.O.

The appellants cited 5 Bythewood's Conveyancing, 4th ed., p. 202, note *k*: "Where a term of years was assigned to A. to hold from a certain future event, the 'all estate' clause, which was inaccurately inserted in the premises, was held to control the *habendum*, and have the effect of vesting the intermediate interest in the assignee: *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk 346; Shower P. C. 4th ed., 252; but see in *Burton* v. *Barclay*, 5 Moo. & P. 715."

This is misleading. If the "all estate" clause had been in *Germain* (*Jermyn*) v. *Orchard*, the case would now be perfectly plain. But it is not there. It is stated to be there in the pleadings, as reported in Skinner. But in Shower the assignment is set forth *in hæc verba*, and there is no such clause. When Abbott, C. J., refers to *Germain* (*Jermyn*) v. *Orchard*, he cites it correctly as in Shower. Had there been such a clause as stated by Skinner, it could not possibly have escaped the well considered judgment by him delivered. Had such a clause been here, there would be little to argue as to the premises containing an express grant.

Doe d. Timmis v. *Steele*, 4 Q. B. 663, may be referred to as giving a definition of the office and effect of an *habendum*. See also Challis's Real Property, 2nd ed., p. 377, cited in the judgment below.

Although my inclination would in the first instance be rather against the argument that there was no express grant of the term, yet my doubt does not amount to dissent.

I have come to the conclusion that the *habendum* here may be used to limit the grant of the term, confining its operation and extent to the last day but one of its duration. I think we may take the day named to be the last day. This construction of the *habendum* need not be repugnant to the premises nor void as creating a different estate, as in some of the cases.

I am not free from doubt as to the assignment of the renewal rights clauses and the authority given to the

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appellants to require such renewal and to act therein in the name of the mortgagor. They read as curiously inconsistent with the fact that the term assigned is at an end the day before the renewal would be required. But all these provisions lie in the covenant and in discussing the purely technical point as to the nature of the estate assigned we need not further discuss them.

BURTON, J. A.:—

The learned Judge who tried this case has devoted a good deal of care and research to the investigation of the questions of law involved, and if I could take the same view of the words contained in the premises of the instrument under which those questions arise, I should have no difficulty in adopting his conclusion, which I think upon that assumption is the correct one, but after a careful consideration of the words of the grant I feel myself unable to arrive at the conclusion that this is an express grant or assignment of the whole term.

The mortgage professes to be made under the Short Forms of Mortgages Act, which relates only to mortgages of real estate, and is not applicable to mortgages of leaseholds, and it is not unlikely that some difficulty might arise in construing some of its provisions, as it may be that the extended form of words could not be resorted to, but the parties may possibly be confined to the common law meaning of the words used in the short form, as to which it is not necessary to express any opinion.

It recites the lease from Jamieson to the mortgagor, his executors, administrators and assigns of the lands hereinafter mentioned for the term of twenty-one years, subject to the rents, covenants and conditions therein reserved and contained, and with the rights of renewal therein contained, and then proceeds to grant and mortgage unto the mortgagees, their successors and assigns forever: 1st, the indenture of lease and the benefit of all the covenants therein contained; 2nd, the land and premises, describing them.

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BURTON, J.A.

There is no reference here to any term, but it is said that it is to be inferred that the whole interest was intended to be assigned from the use of the words "for ever." It does not seem to me that the use of those words adds any thing to what is implied in a grant to a corporation aggregate; the grant of the indenture of lease can only mean the indenture or writing. As said in *Germain (Jermyn)* v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, lease in itself imports only the conveyance or instrument of conveyance, not the interest in the thing conveyed; a man may assign his lease and yet retain the greater part of the term

Then as to the grant of the land:—It does not profess to grant all the estate and interest of the mortgagor in the land, in which case the whole term would pass; all that the deed professes to do here is to indicate the land which is to be the subject of the grant. Then it declares that the engines and boilers which then were, or should at any time thereafter be brought upon and placed upon, or affixed to, shall form part of the leasehold premises thereby granted and mortgaged or intended so to be, and form part of the term hereby granted and mortgaged.

This, to my mind, gives no indication of what estate is intended to be granted, but simply that they shall form part of the term which may be granted and mortgaged, whatever that may be. So far, therefore, there is nothing in the instrument to shew what estate or interest is intended to be assigned, nor does the reference to right of renewal carry the case of the plaintiff any further. We are not concerned, at present, with considering whether there may or may not be any difficulty in enforcing a renewal of the lease from time to time, but it is clear that there is no estate expressly granted, but it arises by implication only if at all, although I should prefer not to refer to it in that way, but to say that there is no reason, under such circumstances, to suppose that any estate, by implication, arises by a transfer of the lease, and the bare mention of the grantee of the land or a description of the land itself.

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BURTON, J.A.

The old law upon the subject is thus stated:

The premises of a deed are all the foreparts of a deed before the *habendum*, and the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, and herein is sometimes (though improperly) set down, the estate; the office of the *habendum* is to set down the estate to be made and limited. At the present day this *habendum* is frequently dispensed with altogether if the granting part of the deed contains proper words of limitation.

The case of *Goodtitle* v. *Gibbs*, 5 B. & C. 709, is very different from the present case, as it was dealing with an estate of freehold, and much of the learning in that case was as to the operation of the Statute of Uses grounded on the pecuniary consideration, but it contains a very learned dissertation on the subject generally, and is mainly of importance in shewing the view taken by the Court of the old case of *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, which was much relied on in the argument of this case.

In the case in the House of Lords, where the decision of the Exchequer Chamber was affirmed, the assignment was set out very fully.

There was a full recital of the lease, and a deducement of the title down, and then the grant was in these words: "The said Thomas, as well for and in consideration of the natural love and affection which he beareth to the defendant his grandchild, as for other good causes and considerations, hath granted, assigned and set over * * unto the said Mary, her executors, administrators and assigns, all the said cottage, barn, and lands, and all and singular other the premises hereinbefore recited or mentioned, with the appurtenances to the same belonging or appertaining; together with the said recited lease, and all writings and evidences touching the premises, *habendum*, to her, her executors, administrators and assigns from and immediately after the death and decease of the said Thomas Nicholas and Mary his wife," etc.

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BURTON, J.A.

Now, when we refer to the recitals in the deed it contains one that the term of 100 years is settled and vested in him, and that he is lawfully interested therein, so that the words in the grant which I have quoted above might well be held to refer to the title and estate recited and mentioned before, and that in itself is sufficient to distinguish it from the assignment we are now considering, but Abbott, C. J., in commenting on that case, has underscored the words executors, administrators and assigns, as if to shew that the whole interest in the term and not a partial interest for her life or at will was intended to pass.

The distinction as to the effect of the *habendum* between deeds in which premises expressly mention an estate or interest, and those in which the premises merely describe the tenements, but do not mention any estate or interest is pointed out in several cases referred to in *Goodtitle* v. *Gibbs*, 5 B. & C. 709. If an estate is limited in the premises there is no necessity for an *habendum*, and if an *habendum* follows which is repugnant to the premises or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises.

Thus regarded the estate granted by the *habendum* is not of the residue of the term, but of that residue less one day.

The mortgage in question might have been effected either by an assignment of the term out and out subject to redemption, or by a sub-lease for a portion of the term. Each has its peculiar advantages and disadvantages and the same end as is secured by a sub-lease might be obtained as was attempted here in a less formal way by an assignment of a portion of the term. There is nothing, therefore, in one of the reasons against the appeal that the assent of the respondent was procured to this as an assignment; it was still an assignment, although not of the residue, but only of a portion of the term.

I think that some of the conveyancers who practised the art in the days when I first commenced the study of

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BURTON, J.A.

the law, would have been surprised at the want of precision to be found in this mortgage, in adopting a form of mortgage applicable only to an estate of freehold, and in making the exception of a day in the way in which it is excepted here, instead of excepting the last day or week of the term, as it is usual to find the exception in assignments artistically drawn, but I think it must be obvious to any one reading this instrument, that what was intended was to avoid the liability attaching to a person who became the assignee of the entire term, and that applying the maxim *Verba ita sunt intelligenda ut res magis valeat quam pereat*, one may place such a construction upon the instrument as will best carry out that intention.

I have come, therefore, to the conclusion that the residue of the term did not vest in the company, and that they cannot be made liable as assignees.

OSLER, J. A. :—

I concur in allowing this appeal.

MACLENNAN, J. A. :—

The first and main question in this appeal is whether the *habendum* is void as repugnant to the grant in the premises; and next, whether, if the *habendum* is good, the day excepted therein is to be taken to be the last day of the term, or may mean any other day, and is, therefore, so uncertain as to be of no effect and to be rejected altogether.

The case was argued before us with great ability and learning on both sides.

The learned Judge, in a very elaborate judgment, has held that upon the authorities the *habendum* is void as repugnant inasmuch as in his opinion the premises grant the whole term, and that being so, the *habendum* cannot be allowed to cut it down to something less than the whole. In construing the premises, great stress was laid by counsel upon the use of the words, "their successors

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MACLENNAN, J.A.

and assigns for ever," after the word "mortgagees" in the granting part. It was said that those words import that the mortgagor intends to grant the whole term; that the words have the same effect as the word "heirs" in a grant of freeholds, or the words "executors and administrators" in a grant of leaseholds, to a natural person, as was held in *Goodtitle* v. *Gibbs*, 5 B. & C. 709, with regard to freeholds, and in *Germain (Jermyn)* v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, with regard to a leasehold. Now, I am of opinion that those words can have no such effect, or any effect whatever in the construction of the deed. The appellants are a corporation aggregate, and in a grant to such a corporation, the word "successors" is unnecessary for any purpose, "because, in judgment of the law they never dye:" Co. Litt. p. 9 *b.* (*t*); and a grant to a corporation aggregate has, therefore, the same effect, whether those words are used or not. See also 1 Kyd on Corporations, p. 104; Grant on Corporations, p. 110; Elphinstone, Norton and Clark on the Interpretation of Deeds, p. 226.

The same reason applies to the use of the other words "assigns" and "forever." It was also urged upon us that the grant of the lease, and "the benefit of the covenants and agreements therein contained," imported a grant of the term, but I do not think so. I agree that if there were no *habendum* in this deed, the grant of the lease and the benefit of the covenants and agreements would warrant the construction that the term was intended to pass; but it would not be an express grant of the term, but a grant by implication, the effect of which is very different, according as it is or is not followed by a *habendum*.

The respondents also relied on the words added to the description of the land referring to the engines and boilers, "which are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be, and be and form part of the term hereby granted and mortgaged." It is said these words include the whole term, and help the conlcusion that

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the whole term is granted by the premises. I think that contention cannot be maintained. The declaration that for the purpose of the mortgage the engines and boilers are to be regarded as part of the said leasehold premises hereby granted and mortgaged, affords no assistance in determining the estate in those leasehold premises which is intended to be granted. The said leasehold premises is the land which has just been described, and that is what is hereby granted and mortgaged and intended so to be; but there is no statement involved in those words of the extent of the interest thereon which is to be granted. So also of the final words "and be and form part of the term hereby granted and mortgaged." The question is what term is hereby granted and mortgaged? Those things are to be part of the term granted and mortgaged, whatever that may be, but so far that term has not been expressed or defined, and could only be implied from the language used, in the absence of something express or explicit.

I therefore think it clear that so far as the premises are concerned it is only by implication that the extent of the interest in this term of years which was intended to be granted could be gathered from its language. If the deed had stopped there the whole term would have passed, by implication of law.

Now the authorities establish that it is only where the estate or interest limited by the *habendum* is repugnant to an express interest or estate granted by the premises that the former is void. That is established by the case of *Germain* (*Jermyn*) v. *Orchard*, already referred to, affirmed in the House of Lords. The arguments of counsel on the one side and on the other are very fully stated in the report of the case in Shower P. C., 4th ed., 252; but the reasons for the judgment are to be found in 1 Salk. 347 and 3 Salk. 222. In that case the grant was "to the said Mary, her executors, administrators and assigns." Holt, C. J., in the Court of Queen's Bench, decided that those words in the premises created a mere tenancy at will;

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but the Judges of the Exchequer Court determined that the use of the words executors, administrators, etc., had a larger effect and was sufficient to pass the whole term, although it would have been otherwise if those words had not been used. That case was followed by *Goodtitle* v. *Gibbs*, 5 B. & C. 709, a case which was argued by Coote on the one side and Preston on the other.

It was admitted by Mr. Preston in his argument, that the *habendum* may control the grant where the estate in the grant is not express, p. 715, and Abbott, C. J., in his judgment, p. 717, uses the following language: "If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed, except by implication and presumption of law, but if an *habendum* follow, the intention of the parties as to the estate to be conveyed will be found in the *habendum*, and, consequently, no implication or presumption of law can be made, and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any *habendum*, and if an *habendum* follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the *habendum* shall be rejected, and the deed stand good upon the premises." In the following page he cites *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252, and shews that the ground of that judgment was that the entire residue of the term passed by the premises of the deed, in which the words "executors, administrators and assigns" were used in the premises, in connection with the granting words. It is also evident from the concluding part of the judgment, that if the estate or interest given by the *habendum* had been merely by implication, and not express, the result would have been different. Then we have the more recent case of *Boddington* v. *Robinson*, L. R. 10 Ex. 270, in which Cleasby, B., delivering the judgment of the Court,

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says: "The authorities establish, we think clearly, that if the grant in this case had been to Johnson (omitting the words 'administrators,' etc.), then, as there would only be an implied estate for life in him, the express limitation in the *habendum* would destroy the implied estate, and as it would not in law take effect, being the creation of a freehold estate *in futuro*, the deed would be void. * * But the authorities also establish, we think, with equal clearness, that if the grant in the premises had been an express grant to Johnson for life, or to Johnson and his heirs, then the *habendum*, though void in itself, would not destroy the express grant in the premises, but the grant in the premises would take effect, of course so far as it could, upon the estate of the grantor," and he cites, as authorities, *Goodtitle* v. *Gibbs*, 5 B. & C. 709, and *Germain* (*Jermyn*) v. *Orchard*, Skin. 528; 1 Salk. 346; Shower P. C., 4th ed., 252 He then goes on to say: "We have here a third case, a grant to Johnson, his executors, administrators and assigns, not naming any term, and the question is, under which head this case comes. It appears to us that the present case is not a case in which there is an implied estate from the grant in the premises, but an express estate with apt words."

In the present case I am of opinion that the only express grant in the premises is a grant of the land, and the engines and boilers, and that there is no express grant of any particular estate or interest or term therein. The expression of that estate interest and term is left to the *habendum;* which is its peculiar office in a grant, and there is therefore no repugnancy between the premises and the *habendum*.

The remaining question is upon the construction of the words of the *habendum*, and I think the day which is excepted must be taken to mean the last day of the term, and not the first or any other day. The whole clause must be read together, and a consistent meaning and effect must if possible be given to all the words. It is evident that what is intended by the clause as a whole is to express and define

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the duration of the term which is to pass to the mortgagees. It is the residue yet to come and unexpired of the term created by the lease, less one day thereof. The presumption in the creation of a term, where the time of the commencement is not expressly mentioned, is that it is to commence immediately, and I think it must equally be presumed that it is to continue unbroken to the end, and therefore that the excepted day must be the last day. The same construction must, for the same reason, be put upon the release clause, which contains the same exception in similar terms. The day which is excepted must be the same day in both cases.

A good deal was said about the grant of the right of renewal and the covenants relating thereto. In my opinion the provisions and covenants relating to renewal do not affect the question. The right of renewal rests altogether in contract, both in the lease and in the mortgage, and is not at all a question of estate, which alone has an effect upon the liability of the appellants to the original lessor upon the covenants contained in the lease.

I may add that in my opinion the Act respecting the Law and Transfer of Property, R. S. O. ch. 100, has introduced a more liberal construction of deeds and instruments relating to land, and that in the absence of words of limitation the whole estate and interest of the grantor will be deemed to pass, save as a contrary intention, or exception, is found in the deed: sections 4 (3), and 12. In the present case the *habendum* appears to me to be the expression of such an intention and exception.

I am, therefore, of opinion that the appeal should be allowed, and that the action should be dismissed.

Appeal allowed.

TOWNSHIP OF LOGAN v. HURLBURT.

Public Health Act—R. S. O. ch 205, sec. 84—Person Suffering from Infectious Disease—Failure of Board of Health to Isolate—Consequent Spread of Disease.

The directions of section 84 of the Public Health Act, R. S. O. ch. 205, are imperative.

Where, instead of acting as directed in that section, by isolating and taking care of a person suffering from an infectious disease, the members of a local board of health send him into an adjoining municipality, they are personally liable to repay to that municipality moneys reasonably expended in caring for him and preventing the spread of the disease.

Judgment of ROBERTSON, J., affirmed, HAGARTY, C.J.O., dissenting.

Statement. THIS was an appeal by the defendants from the judgment of ROBERTSON, J.

The action was tried before him at Stratford, on the 30th of November, 1895, and in the following judgment, subsequently delivered by him, the nature of the action and the facts and arguments are stated:

ROBERTSON, J. :—

This action was tried before me at Stratford, at the last non-jury Sittings, and is brought by the corporation of the township of Logan, Tom Coveny, Francis Jacob, Thomas Hill, John Leonhardt, and John McGrath, being the reeve and township clerk, and three ratepayers, who constitute the local board of health of that township, against Richard W. Hurlburt, the medical health officer of the town of Mitchell, W. H. Davis, ex-mayor of that town, James R. Christie, town clerk, *ex officio* members of the local board of health of that town, William George Murphy and William Taylor, also members of that board of health, and the corporation of the town of Mitchell, to recover moneys which the plaintiff corporation was obliged to pay, as is alleged, by reason of the defendants, other than the town of Mitchell, having wrongfully sent from the town of Mitchell into the township of Logan, one William Andrew Seebach, a resident of the city of

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Chicago, in the State of Illinois, then being temporarily in the said town, he, the said Seebach, being at the time, to the knowledge of the defendants, who were members of the local board of health at Mitchell, infected with the contagious disease known as smallpox, by reason whereof the said disease was communicated to one Mary Seebach, who was then residing there, and who caught the infection from him, and both of whom were for a long time confined to their beds from the said disease in the house of Andrew Seebach, the father of the said William Andrew Seebach, and the husband of the said Mary Seebach, the latter of whom would not have had the disease had the said William Andrew Seebach not been sent to the house of the said William Seebach, as aforesaid, whereby and by reason whereof the said corporation of Logan was obliged to pay, and did pay, large sums of money incurred by the local board of health of Logan, in taking prompt, proper and necessary measures for isolating the said William Andrew Seebach and Mary Seebach, and procuring competent physicians and skilled nurses to administer to them, and necessary measures for preventing the spread of the said disease, and for confining it, and in all respects performing their duty in the premises, as required by law, amounting in the whole to $700, the said William Andrew Seebach and Mary Seebach being unable and unwilling to pay the plaintiffs the moneys so expended or any part thereof, etc. And the plaintiffs charge that the defendants Hurlburt, Davis, Christie, Murphy and Taylor, knowing as they did that the said William Andrew Seebach was at the time infected with the said disease, committed a wrongful and illegal act in sending him out of the municipality of the town of Mitchell into the municipality of the township of Logan, without the consent of the last named municipality, for which act they are personally liable to the plaintiffs, and that the plaintiffs were obliged to expend the said amount by reason of such act; and they further allege that the said act was done by the defendants lastly named maliciously and without reasonable and probable cause.

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And the plaintiffs further allege that the said defendant Hurlburt, as medical health officer, and the defendants Davis, Christie, Murphy and Taylor, as members of the local board of health of the defendant corporation, were officers, servants or agents, of the said corporation, and that the said corporation of the town of Mitchell is liable for their said acts. And the plaintiffs further allege that at the time the said wrongful act was done, the defendant Davis was mayor, and the defendant Christie was clerk of the said town, and the said act was so done with the full knowledge, acquiescence and consent of the said defendant corporation. And the plaintiffs further allege that the medical health officer and the local board of health of the said town of Mitchell, were the parties whose legal duty it was to take charge of the said William Andrew Seebach, and have him properly attended to and isolated within the municipality of the said town, and at the expense of such municipality; and that in such case the defendant corporation would have been liable for all expenses incurred by the said medical health officer and board of health in so doing; and that the plaintiffs, having been compelled as aforesaid to incur the expenses mentioned, are entitled to be reimbursed the amount thereof by the defendant corporation and local board of health of the said town; that the defendants have refused, and still refuse, to pay to the plaintiffs the amount so expended by them or any part thereof, although requested by the plaintiffs so to do; and they claim, *inter alia*, a mandatory injunction, if necessary, to compel the board of health of the said town to give to the plaintiffs an order on the defendant corporation for payment thereof, etc.

[The learned Judge then referred to the terms of the statement of defence and the reply, and continued:]

The facts are as follows:—

The young man Seebach, who is now twenty-six years of age, was the son of Andrew Seebach of the township of Logan, where he was born, and where he resided with his parents until 1877, when they removed to the town of

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Mitchell, where they kept a tavern, the son becoming a clerk there in a grocery store, where he remained until the year 1891, when his parents sold out their tavern and returned to the farm in Logan, which was owned by the mother of the young man. He remained there from about Christmas, 1891, until the spring after, when he went to Manitoba, where he bought a couple of farms, which he and his father worked, and afterwards sold; and in the spring of 1894, he went from Manitoba to Chicago, where he was engaged as a grocer's clerk until about the 20th of November, 1894, when he left Chicago on a visit to his parents in Logan, intending to stay there only until after the Christmas holidays.

On the 21st of November he reached Mitchell by train and got off there, that being the nearest railway station to his parents' residence, three or four miles distant. He had been feeling very ill on his journey, but did not know what was wrong with him. Having got off at Mitchell, he called on a Dr. Smith in that town who examined him, and having ascertained that a very pronounced rash was breaking out over the body of the young man, and that he was suffering from violent headache and a very severe pain in his back, Dr. Smith gave him a note to, and directed him to call at once on, Dr. Hurlburt (one of these defendants) the medical health officer of Mitchell, which he did. Dr. Hurlburt made an examination of the young man—(this was about 1 p.m.)—and pronounced his indisposition to be the result of smallpox which was rapidly developing.

The young man told Dr. Hurlburt that he was on his way to his mother's home, and that his intention was to walk out there, in case he did not get a chance of a ride with some one who might be driving out in that direction. Dr. Hurlburt told him he could not allow him to go, as he had smallpox.

This was the first intimation he had of the nature of his illness. Dr. Hurlburt then told him that he must remain in the surgery, where he was at the time, and not

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on any account leave until he could find a place for him, where he could receive proper care, etc. Dr. Hurlburt then left him in his surgery, having taken the precaution to close and fasten the door so as to prevent any other person entering until he returned. The doctor had telephonic communication with the hospital authorities at Stratford, twelve miles distant, and endeavoured to make arrangements for Seebach's reception there, but did not succeed. He then called a meeting of the local board of health and laid the whole case before them.

There were present the mayor of the town, the town clerk, *ex officio* members, and Taylor and Murphy, two of the appointed members of the board—the third member, who was the chairman, being absent. The mayor was appointed chairman *pro tem.*, and after discussion, Dr. Hurlburt stated that the young man was willing to go to his parents' home, he having told the doctor, however, that he would go wherever he, the doctor, might think proper to send him, as well as having said that he would go to his parents if the doctor thought proper to send him there.

At this meeting a resolution was passed unanimously and duly entered on the minutes of the board, that the young man should be sent to his parents' home in Logan; the following being the minutes of that meeting:

"MITCHELL, 21st November, 1894.

"Members present—W. R. Davis, W. G. Murphy, W. Taylor, and the Secretary.

"Moved by J. N. Christie, seconded by W. G. Murphy, that W. R. Davis take the chair.—Carried.

"The medical health officer reported that a young man named Seebach, had arrived in town, and is suspected of having smallpox.

"Moved by W. Taylor, seconded by W. G. Murphy, that the young man Seebach, be sent to his home in Logan.—Carried.

"Moved by J. N. Christie, seconded by W. G. Murphy, that the account of Dr. Hurlburt for $8 for professional services, be paid, and that an order be drawn on the treasurer of the municipality for the same.—Carried.

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"The meeting then adjourned."

A horse and buggy were ordered by Dr. Hurlburt and taken to his surgery about six o'clock the young man having been five hours there, when he got into the buggy and drove himself home, and afterwards the charge for the horse hire was paid by his brother.

At this meeting of the local board of health, it should be stated, the reeve of the township of Logan happened to be present, and he protested from the first, although not a member of that board, that the board had no right to send the young man into Logan; and he formally, although verbally, protested in the name and on behalf of the municipality of Logan against the action of the board. No attention was paid to such protest, and the resolution was carried without a dissentient voice.

At the trial all the members of the local board who were present at that meeting, as well as the medical health officer, gave evidence, and they one and all swore that in their judgment it was the best thing that could be done under the circumstances, to send the young man to the place of residence of his parents; and that from what the medical health officer read from a pamphlet to them, they thought they had authority to send the young man on; that, knowing his parents' residence, they thought it would be more isolated than any place in Mitchell, and that it was in the public interest that he should be sent out of town. Moreover, they said they had no place, nor could they get a place, in which they could isolate the patient in Mitchell just then.

The young man having arrived at his parents' residence was taken in there, and steps were at once taken by the Logan local board of health to isolate the case. Communication was had with the health officer of the Provincial board at Toronto, and a medical gentleman (Dr. Brown) was sent up forthwith to take charge of the case, and a professional nurse was employed.

When Dr. Brown arrived on the 24th of November, he found the patient in the eighth day of the disease, and

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fifth of the eruption, there being no difficulty in determining the disease.

On the 30th of November, the mother also exhibited symptoms, and she had a severe attack, but both recovered; the son being able at last to attend to his mother when she was in the worst stage. There was another case which developed afterwards in Logan, about twelve miles from the Seebach cases, which was traced to having been communicated by Seebach to a young woman who was in a room in a hotel where he was on the 21st of November, on the occasion of his stopping off at Mitchell station, but no charge is made for that. The claim of the township of Logan is for money paid to Dr. Brown.....$460 00

Attendance of Dr. Cull before Dr. Brown arrived	15 00
Money paid to nurse at $25 per week	150 00
Drugs, etc., etc.....	33 20
Dr. Smith for medical attendance and drugs.	35 00
F. Davis for supplies and appliances.....	6 80
Making a total of.....	$700 00

A claim was made in writing on the defendants for the amount before action. Notice of action was served on the 19th of April, 1895, on the defendants Hurlburt, Davis, Christie, Murphy, and Taylor, and the writ was issued on the 21st of May, 1895, being within six months after the act complained of.

The Public Health Act, R. S. O. ch. 205, established a local board of health in every city, town, township and incorporated village in this Province; and the mayor of each city and town, the reeve of each township and incorporated village, and the respective city, town, township and village clerks, are *ex officio* members thereof, who, with a certain number of ratepayers (in the case of towns such as Mitchell with less than 4,000 inhabitants, three being the number) to be appointed by the respective municipal councils, are to comprise such boards. In case, however, no such appointments of the ratepayers, by neg-

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lect or refusal, is made, then, by section 46 of the Act, the Provincial board of health may appoint the necessary number of ratepayers, duly qualified, who, with the mayor, reeve and clerk, shall constitute the board; and by section 47 the council of the municipality is to appoint a medical health officer. In this case Dr. Hurlburt had been duly appointed so far back as 1885, and continued to act from that time; and here it should be noted that there is a marked distinction between a "medical health officer" and a "health officer," the members of the board of health being the latter, being so declared by section 50 of the Act. The former has special duties assigned to him, and he is always referred to in the Act as "medical health officer," in contradistinction to "health officer."

Then, in regard to the duties imposed upon the medical health officer and the local board of health, or any committee thereof, it is declared by section 76 that such officer, local board, or committee thereof, may isolate any person having the smallpox or other disease dangerous to the public health, etc. And by section 81, when smallpox, etc., is found to exist in any municipality, the health officers (*i.e.*, any one or more of the members proper of the board), or the local board of health, shall use all possible care to prevent the spreading of the infection or contagion, etc., and, by section 84, in case any person coming from abroad, or residing in any municipality within the Province is infected, etc., with * * any of the said diseases, the health officers or local board of health of the municipality where such person may be, may make effective provision in the manner which to them shall seem best for the public safety, by removing such person to a separate house, or by otherwise isolating him, if it can be done without danger to his health, and by providing nurses and other assistance and necessaries for him at his own cost and charge, or the cost of his parents, or other person or persons liable for his support, if able to pay the same, otherwise at the cost and charge of the municipality. Then, by section 97, in case the smallpox or any other disease dangerous to the public

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health breaks out in any municipality, the health officers or local board of health, in case the municipality shall not have already provided the same, shall immediately provide such a temporary hospital, hospital-tent, or other place or places of reception for the sick or infected as they shall judge best for their accommodation, and the safety of the inhabitants, at the cost of the municipality, and for that purpose may—

1. Themselves erect such hospital-tents, hospitals, or places of reception, or

2. Contract for the use of any such hospital or part of a hospital or place of reception; or

3. May enter into any agreement with any person having the management of any hospital for the reception of the sick inhabitants of their district, on payment of such annual or other sum as may be agreed on. It will be observed here also that it is the "health officers" or the local board of health who are to act, not the "medical health officer."

It was contended before me, that there is nothing in the Act which casts an imperative duty on the health officers or local board of health so to act; that the statute permits such action, but there is nothing imperative, etc. And the Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 2, is referred to as to the construction to be put on the words "shall" and "may;" and I read in connection therewith sub-section 48, which declares that nothing in the section shall exclude the application to any Act of any rule of construction applicable thereto, and not inconsistent with the section; and see also the original Act, 31 Vict. ch. 1 (O.), sec. 6, now section 8 in the Revised Statutes: "Unless it be otherwise provided, or there be something in the context, or other provisions thereof indicating a different meaning, or calling for a different construction," the word "shall," etc.

In taking into consideration the nature and object of The Public Health Act, I do not see that any new light is thrown on the meaning of the word "may." It always

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has a distinctive meaning taken by itself, but when read with the context, may be and often is construed as an imperative command.

Maxwell, at p. 218 (1st ed.), says: "When a statute confers an authority to do a judicial, or indeed, any other act which the public interest or even individual right may demand, it is imperative on those so authorized, to exercise the authority when the case arises." Again, at p. 334, the same learned authority says: "In general, then, it seems that where a statute confers a privilege or power, the regulative provisions which it imposes on its acquisition or exercise are essential and imperative." See also 2nd ed., at p. 303.

In the case of *Supervisors* v. *United States*, in the Supreme Court of the United States, 4 Wall., at p. 446, Mr. Justice Swayne, in delivering the judgment of the Court, after reviewing the authorities, said: "The conclusion to be adduced from the authorities is, that where power is given to public officers in the language of the Act ("may, if deemed advisable," do a certain thing), or in equivalent language, whenever the public interest or individual rights call for its exercise—the language used, although permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

But while there are many things which the Public Health Act declares that the medical health officer, the health officers and the board of health "may" do, there are other functions which they are imperatively required to do, in the public interest, and for the public safety, and in discharge of their duty, and one of these imperative

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duties is declared by section 97. This section contains a command, and that command is addressed to the health officers and the local board of health—they "shall" do certain things under certain circumstances. And taking the whole Act together, I am of opinion that there is an imperative duty cast upon the health officers and the local board of health of the municipality in which smallpox, etc., may break out, to immediately provide, in case the municipality has not already done so, such a temporary reception for the sick and infected, as they shall judge best for the accommodation of such infected person, and the safety of the inhabitants, at the cost of the municipality. Therefore, the duty, the imperative duty, of the health officers and the local board of health was, when they were formally notified by the medical health officer that the young man Seebach was within their municipality, infected with this most contagious disease, to have provided the necessary place for his reception, etc.

I have no doubt, therefore, that it was not a case for these gentlemen—the health officers, as members of the board—to act, or not to act, as they might think proper; the disease was in their midst, and they endangered the public health, when they sent the infected person out to drive himself home on the public highway; they were most fortunate that the result was not far more disastrous than it turned out to be.

If the health authorities in Mitchell had the right to do what they did, why had not the health authorities of Logan the right to send the unfortunate man back the way he came, into the town of Mitchell? They, however, acted more wisely, more considerately, more humanely and more in accordance with their duty as health officers and as a board of health, and in strict accordance with the Public Health Act.

I am, therefore, of opinion that the defendants, the health officers of the town of Mitchell, disregarded their duty in that behalf, and were guilty of a wrongful act against the plaintiffs, the corporation of the township of Logan.

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ROBERTSON, J.

But it is also objected that the plaintiffs cannot recover in this action, for the reason, as they allege, that notice of action was not served on these defendants a month previous to the bringing of the action. They say that anything done by them in respect to the matters complained of, was done by them as public officers, members of the board of health, etc., under the provisions of the Public Health Act, and that they were entitled to receive one month's notice of action, etc., charging that they had acted maliciously and without reasonable or probable cause, etc., and *Kelly* v. *Barton*, and *Kelly* v. *Archibald*, 26 O. R. 608, are relied on. These cases since the trial of this action, have been affirmed by the Court of Appeal.

I think these cases do not support the contention of the defendants; on the contrary, in my judgment they are direct authority in favour of the plaintiffs' contention, that in this case notice of action is not necessary. These defendants, although public officers, are not charged in this action with having done or performed any act in execution of, or under the authority of the Public Health Act.

There is, it is contended by the plaintiffs, and I think properly, a total absence of authority for doing that which has been done, and is complained of. That being the case, I am of opinion that the defendants above named, are not entitled to the protection thrown around public officers fulfilling any public duty, as provided by R. S. O. ch. 73. The complaint here is that instead of performing their duty as such public officers, these defendants abused the authority which they had as the health officers and as a board of health. They acted, it is true, under the guise of the Act, but in direct contravention of it, like the justice of the peace in *Agnew* v. *Jobson*, 47 L. J. M. C. 67, who made an order for the medical examination of a woman charged with concealing the birth of her child, under which her person was examined; Lopes, J., holding that the justice was a trespasser, and that no notice of action was required. So that by means of such contravention of the Act, these defendants inflicted a grievous wrong on

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the plaintiffs, and it makes no difference, though these defendants may have acted *bonâ fide*, believing that they had the legal right, and that what they did was their official duty. On the contrary, they acted in direct violation of, and in utter disregard of, their plain and imperative duty. They did an act which imposed a duty on another local board of health, and that imposition has greatly damnified the plaintiffs, the corporation of Logan; and there was neither authority or jurisdiction on the part of the defendants, the health officers or board of health, to warrant them in so doing. I am, therefore, of opinion that notice of action was not necessary, so far as these defendants are concerned, on the ground that they voluntarily did something which was not imposed on them, in the discharge of their public duty.

It is also objected that the local board of health of Mitchell was not legally appointed, and that for that reason any act done by it, or its members, they are not legally responsible, and section 282 of the Consolidated Municipal Act, 1892, is relied on. That section declares that "the powers of the council shall be exercised by by-law, when not otherwise provided for," and *Waterous Engine Works Co.* v. *Palmerston*, 21 S. C. R. 556, is cited in support of this contention. As to this objection, I do not think it necessary to consider it, for the reason that in my judgment, whether the passing of a by-law was necessary or not, I do not think the defendants, the health officers or members of the board of health, can avail themselves of the want of such a by-law; they are in my judgment, estopped from doing so.

The *modus operandi* in this case was as follows: At a meeting of the council held on the 15th of January, 1894, being the first meeting of council after being organized, as required by section 40 of the Public Health Act, a special committee of the council appointed to strike standing committees, etc., for the year 1894, brought in their report, which was received and unanimously adopted by the council. That report contained *inter alia* the following recommendation:—

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ROBERTSON, J.

"Clause 8, Board of Health.—W. G. Murphy, L. R. Stuart, W. Taylor." These gentlemen were three ratepayers of the town, who, with the mayor for the time being, and the clerk, were to constitute the local board of health, but no by-law was passed or introduced. In pursuance of this action of the council, these five gentlemen met on the 27th of February, 1894, and organized and appointed Mr. Stuart, chairman for the year, the town clerk being the secretary under the Act. After this they met as a properly constituted board no less than nine times during that year, at each of which meetings business appertaining to them as a board, was transacted, and a proper minute book was kept, in which the secretary entered all their acts and proceedings. They ordered money to be paid under section 49 of the Act, and the town treasurer paid the same, the amounts being voted by the council, it is presumed, for carrying on the work of the board as provided by section 48. Having thus acted and performed all the functions of a duly constituted board, as if duly appointed, I do not think that the individual members of the board can be heard to say that there was not a board of health *de jure* for the town of Mitchell.

They certainly constituted a board *de facto*, and if they, as a board, or as individuals, members of such, commit a wrongful act, while acting as such, I do not think they can shield themselves from the consequences by reason of their appointment not having been made by by-law—even if that was necessary. The plaintiffs do not claim to recover against the health officer and the local board as such, but against the members thereof as individuals, for doing an act which they professed to do as such health officers and board of health. Having assumed to act, they cannot now be heard to say that they had no authority to meet as a board and perform the functions thereof, and for that reason cannot be held responsible for such acts, etc.

So far I have considered the general questions involved in regard to whether an action will lie at the suit of these plaintiffs, or any of them, against these several defendants

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or any of them for the wrongs complained of, and being of opinion that such action is maintainable, it is in order to consider whether the whole of the plaintiffs are entitled to recover, and, if not, which of them? I think there is no doubt that the corporation of the township of Logan are the proper plaintiffs. It is that corporation which has been damnified by reason of the acts complained of; they were obliged to assume the responsibility incurred by the local board of health of Logan, by reason of the acts complained of; and it was on the order or orders of the members of that board that the amounts now claimed to be recovered were paid. I do not think the plaintiffs other than the corporation of Logan are necessary parties; but the defendants have not, nor has any of them, in any degree been prejudiced by reason of this misjoinder of parties as plaintiffs. And I think the proper way to dispose of them will be to strike out the names of Tom Coveny, Francis Jacob, Thomas Hill, John Leonhardt and John McGrath as plaintiffs, under Consolidated Order 324, and leave the corporation of the township of Logan as the only plaintiffs to the action. The Order 324 (*a*) is so clear as to this power, that one hardly requires a decided case as authority; but in the late case of *The Duke of Buccleuch*, [1892] P. 201, the Court of Appeal affirmed an order of Jeune, J., made under the corresponding order in England, for damages by collision, when the name of the agent, instead of that of the owner of the cargo on board the plaintiff's vessel, was, by mistake, inserted in the writ as a co-plaintiff. The case was carried to the House of Lords on the main question as to liability between the two vessels, with the result that the defendant's vessel was found alone to blame, and a decree made in favour of the plaintiffs. The mistake was then discovered, and to enable the claim of the cargo owner for damages to be assessed, Jeune, J., made an order that the name of the owner of the cargo should be substituted for that of the agent as plaintiff. The Court of Appeal held that there was power even at that stage of the proceed-

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ings under the order referred to, to make the order, which was affirmed. That case is where a new plaintiff was substituted; in this case without the application of either party, I propose to strike out the names of all the plaintiffs other than the corporation of the township of Logan, leaving the latter as sole plaintiffs. There will be no wrong done to the defendants or any of them by such an order. They have still as plaintiffs the corporation of Logan, and the expense or costs of the other plaintiffs being made parties originally has not effected the defendants prejudicially in any way; and there is no reason why, merely because these plaintiffs were joined with the other plaintiff, that the action, so far as they are concerned, should be dismissed; it was a mistake joining them as plaintiffs with the township. I will, therefore, order that their names be struck out; and I will now consider the rights of the plaintiffs who are left, as against the several parties defendants.

The plaintiffs charge in the 15th paragraph of their statement of claim, that the defendants other than the corporation of Mitchell, as members of the local board of health of the defendant corporation, were officers, servants, or agents of the defendant corporation, and that it is in law liable for their said acts. The defendant corporation join issue on this, and the conclusion I have come to is, that the defendant corporation is right.

Before the passing of the Public Health Act, 1884, the members of the municipal councils of every municipality in the Province were declared by R. S. O., 1877, ch. 190, sec. 2, to be health officers within their respective municipalities; but any such council might by by-law delegate the power of its members as such health officers to a committee of their own number, or to such persons, either including or not including one or more of themselves as the council should think best. And the powers of such health officers were defined by sections 3, 4, 5, 6 and 7, of that Act; and by section 9, whenever this Province, or any part thereof, or place therein, appeared to be threatened

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with any formidable epidemic, etc., the Lieutenant-Governor might by proclamation, declare the subsequent sections of that Act in force, etc. Upon the issuing of such proclamation (section 11), and whilst the same was in force, sections 2 to 7 inclusive, were suspended, etc., unless otherwise declared by such proclamation. Then, by section 14, the mayor or other head of the municipality of any and every place mentioned in such proclamation, etc., might call a special meeting of the council over which he presided, for the purpose of nominating a local board of health; then (section 15) such council were required to nominate not less than three residents of the municipality to be "the local board of health" for such place. The powers of the local board of health were defined by other sections of that Act. Then, by sec. 12, sub-sec. 1 of the Public Health Act, 1884, it is declared that all the powers and authorities conferred upon or vested in the members of any municipal council, etc., by any statute of the Legislature of the Province, as health officers, etc., shall hereafter be vested in the local board of health, which shall be formed as by that Act provided.

In the consolidation of the statutes (R. S. O., 1887, ch. 205), these powers are distributed and set out in sections 49, 50, 67, 68 and 70, and I gather from the whole Act that the local board of health as now constituted under the Act last mentioned, is, to all intents and purposes, an independent body not under the control of the governing body of any municipality. The councils are required (by section 48) to vote such sums as are deemed necessary by the local board of health for the carrying on of its work; and the treasurer is obliged forthwith on demand to pay out of any moneys of the municipality in his hands, the amount of any order given by the members of the board, or any two of them, for services performed under their direction by virtue of the Act.

In so far then as the defendants, the corporation of the town of Mitchell are concerned, I do not at present see how that corporation can be held responsible for a tort—

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the act complained of being clearly such—committed by the local board of health, or any of its individual members.

It was urged before me that the board of health having power to draw orders on the municipal treasurer for services performed under the Act, that in case the board, or the members thereof, are liable to the plaintiffs for the act complained of, such board or any two of its members could be required to order that the plaintiffs' claim should be paid by the municipal treasurer—no authority for such was cited before me, and I can find none.

The plaintiffs' case here is, that by reason of an act done by the members of the board of health, which they had no authority to do, the individual members of the board, who were parties to the act are liable, and that the right to give orders on the treasurer under such circumstances comes within that section of the statute. The orders are to be given and paid for services performed under their direction by virtue of the Act, not for damages recovered against them for a tort committed by them under the guise, but contrary to the directions of the Act.

It appears to me, therefore, that the corporation of Mitchell is not liable to the plaintiffs in this action. As a corporation they had no power to prevent the act complained of—even had there been time sufficient to permit the council of the corporation to meet, and had they met and resolved that the action taken by the members of the board was illegal or improper in any sense, and that the young man Seebach should not, in their opinion, be sent away from out the municipality, such resolution could not be enforced. The board of health could have disregarded it. And to make the corporation liable under such circumstances, it appears to me, would be impossible. Nor does the fact of the mayor being one of the members of the board make any difference. As such member, he was not, nor were any members of the board agents of the corporation, or in any sense acting for it.

Then the next question to be considered is as to the

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liability of the defendant Hurlburt. This gentleman stands in a position different from that of "health officers;" there is a marked distinction between their respective powers and duties. The members of the local board of health are "health officers" (section 50), but the medical health officer is not a member of the board. He is the appointee of the municipal council (section 47), which regulates his duties and pays him a stated salary, or for services actually rendered from time to time, as they may determine; and should the council not appoint such an officer in cases where from the presence of any formidable contagious disease in any locality (sections 31 and 32), after request made by the Provincial board of health, the Lieutenant-Governor, upon the recommendation of the Provincial board of health may appoint one for such municipality, and under section 33 every medical health officer appointed by the municipality, shall hold office during the pleasure of the council, provided always, however, that the council may at any time upon a two-thirds vote of its members, dismiss him for neglect of duty; and his powers and authority, section 37, are declared to be "all the powers and authority possessed by any health officer or sanitary inspector under the Act, and he is obliged to perform all duties imposed upon him by any regulations of the Provincial board of health, and the fact that similar duties are by statute imposed upon the local board of health, shall not relieve him from the performance of such duties; and by section 58, he may exercise any of the powers conferred upon the "health officers" by sections 66, 67 and 70 of the Act, and may without being specially authorized by the board, exercise any of the powers which may under section 68, be conferred upon two medical practitioners, which appears to be a provision made to meet cases where there may be no regularly appointed medical health officer, or where the "health officers," members of the local board, may think it desirable to engage the services of these gentlemen in the circumstances pointed out in the section.

He also, under the direction of the local board of health,

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shall have authority (section 65) to make, etc., by a veterinary surgeon or such other competent person as the circumstances may require, a periodic inspection of all dairies, cheese factories, etc. As an instance shewing how the Act distinguishes between the powers and duties of "medical health officers" and merely "health officers" in certain cases, the next section (66), declares that "the health officers, or any two of them, may enter and examine any premises in the place for which they hold office, and examine such premises, etc.

Now, the specific act complained of by the plaintiffs is that set forth in paragraph 6 of their statement of claim, as follows: The said defendants Davis, Christie, Murphy and Taylor, met together (with their co-defendant Hurlburt) as the board of health of the said town, and under the instructions and advice of their said co-defendant Hurlburt, on the said 21st November, passed a resolution that the said Seebach should be sent to the house of one Andrew Seebach, in the said township of Logan; and the plaintiffs say that the young man Seebach's case came within section 84 of the Act. He was a person who came from abroad to the municipality in which the local board had jurisdiction, infected with smallpox, whereupon the plaintiffs say it was the duty of the "health officers" or local board of health, to make effective provision for the public safety by removing the young man to a separate house, or by otherwise isolating him, etc., and to provide nurses and other assistance and necessaries for him, etc.; but in contravention of that duty, they passed and carried out the resolution complained of. And the plaintiffs say that this was done by the members of the board of health under the instructions and advice of the defendant Hurlburt, and they claim to make him with the members of the board responsible for that act.

Whatever may be thought of the "advice" which Dr. Hurlburt gave the board on the occasion referred to, his conduct in every particular up to that time was most commendatory. In my judgment, he performed his duty as

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medical health officer to the utmost limit, and with a disinterestedness which compared most favourably with the action of some others, whose names I need not mention. He at once and for the time being, took charge of the unfortunate young man at the risk of the health of his own family, and to all intents and purposes temporarily isolated him as far as he could. He made efforts to arrange for his removal to the hospital at Stratford, although unsuccessful. He then did his duty by calling the local board together without the slightest delay, and reported the case fully to that body, who fully considered the situation and resolved by formal written motion to do what was done. But it is said Dr. Hurlburt "advised and instructed" the members of the board to do what is complained of. I cannot find in the evidence that he did either. I find, however, that he consulted with them, as I think he could properly do, and as was his duty to do, but I am not prepared to find that the ultimate action of the members of the board was in consequence of that advice, pure and simple. Moreover, in my judgment the board had no right to ask for, or act upon such advice. It was not the duty of the medical health officer to advise the board as to their legal duties. The 1st section of the statutory by-law—Schedule A. to the Act—defines the matters as to which the medical health officer is to "advise and assist the board and its officers," and that is in such matters as relate to the public health, and to superintend, under the direction of the board, the enforcement and observance of health by-laws or regulations, and of Public Health Acts, and of any other sanitary laws, etc., which in my judgment does not cover or extend to the legal construction of the Act as to their powers thereunder—that is a legal question which does not come within the province of the medical health officer. In order to make him responsible, it would be necessary to charge and prove that he and the members of the board wrongfully conspired to do and commit the wrong complained of, and that has not been done. The board took the case out of his hands, and relieved him of

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all authority in the matter. So far, then, as the defendant Hurlburt is concerned, I am of opinion that the plaintiffs' case fails as to him, and the action should be dismissed as against him also.

Then, as to the other defendants I think a case has been made out, and I think they wrongfully acted, and in direct violation of their imperative duty as pointed out, not only by section 84, but by section 87.

In this case a ministerial act was to be done by the members of the board of health—the statute points out and declares what they shall do, under the circumstances then present. If they had resolved to do nothing, instead of having resolved that he "be sent to his home in Logan," in my opinion they would be liable for the consequences to whomsoever might have suffered by reason of their want of action. How much stronger then is the case when they actively did do what has resulted in such serious consequences to the plaintiffs? Under section 97 it became their imperative duty to have immediately provided such a temporary hospital, hospital-tent, or other place of reception for the young man (sick as he was with a most contagious disease), as they should best judge for his accommodation, and the safety of the inhabitants, at the cost of the municipality, or in terms of the sub-sections 1, 2 and 3, of that section—and, not having done so, but having ordered that he be sent out of their municipality into that of the plaintiffs, by reason whereof the plaintiffs have been put to great expense, and have suffered much wrong, the defendants Davis, Christie, Murphy and Taylor should have judgment against them for the amount claimed, $700.

I have not, so far, disposed of the question of costs, as to which I feel some doubt, not in regard to the plaintiffs' right to them as against the defendants Davis, Christie, Murphy and Taylor, because I think they are clearly liable, and should pay the plaintiffs' full costs of the action. Then as to the defendant Hurlburt, he and the other four defendants have defended jointly—they, so to speak, have been "sailing in the same boat," and there have been no extra

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cost incurred by reason of having joined him as defendant; they have all appeared by one solicitor, and by the same counsel at the trial, and the defence urged for the one was urged for the others jointly, there being no separate defence pleaded by any of them, and it would be tantamount to making the plaintiffs pay the costs of defence of the whole of these defendants, if I ordered them to pay the defendant Hurlburt's costs, which would be most unjust. I will dismiss the action as against Hurlburt without costs.

There will, therefore, be judgment for the plaintiffs for $700 damages, with full costs of the action, against the defendants Davis, Christie, Murphy and Taylor, and the action will be dismissed as against the defendants the corporation of the town of Mitchell, with such costs as may be taxable to them, over and above the costs incurred by the other defendants, and the action will also be dismissed as against defendant Hurlburt, without costs.

The defendants appealed, and the plaintiffs by way of cross-appeal asked for judgment against all the defendants, and the appeal and cross-appeal were argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th and 26th of March, 1896.

Idington, Q. C., for the appellants. The question arises under section 84 of the Public Health Act, R. S. O. ch. 205, and it is whether there is merely permissive power or an absolute duty. The former is the proper construction. It is unreasonable to hold that it is imperatively necessary to stop a patient wherever he is. There is no imputation of bad faith, and it is clear that there was no active deportation. At most there was merely nonfeasance, and no liability results from that. Dr. Hurlburt, it is true, looked after the patient for a few hours, but that did not give him control: *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187. The section is permissive: *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214; *Osborne* v. *Kingston*, 23 O. R. 382; *Wilson* v. *Mayor of Halifax*, L. R. 3 Ex. 114; *Regina* v. *Bishop of Chicester*, 2 E. & E. 209. The

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cases cited below are cases of ministerial duty. Here judicial consideration was necessary, and the defendants having in good faith decided that it was not necessary to keep the patient in Mitchell, no action lies. The present construction would lead to the grossest absurdity. A woman might bring a sick child to another municipality to visit a doctor. That child is found to be suffering from scarlet fever. Then, as now held, that child must at once be kept in that municipality and not allowed to return home. Clearly there must be the exercise of discretion. There is a marked distinction all through the Act in the use of the words "shall" and "may." See for example sections 75, 76. Section 97 does not carry the matter further. It is conditional upon the disease breaking out in the locality. There is nothing in the Act providing for one municipality recovering from another the cost of maintaining a patient. At most there would be a liability for the penalties given by the Act, and no liability as to damages: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441. The damages are too remote, and too great expense was gone to. The plaintiffs should not have done more than isolate the patient, and cannot ask the defendants to pay for the other steps unnecessarily taken—*Burton* v. *Pinkerton*, L. R. 2 Ex. 340—and cannot charge for the care of the mother. The defendants were not properly appointed members of the board of health and could not do the acts for not doing which they have been held liable. They should have been appointed by by-law: *Waterous Engine Works Co.* v. *Palmerston*, 21 S. C. R. 556. Notice of action was necessary, and proper notice has not been given. There is no allegation of malice and no proof of malice. The defendants are at all events not personally liable. If there be any liability, it is that of the board: *In re Workman and Lindsay*, 7 O. R. 425; *Re Derby and South Plantaganet*, 19 O. R. 51.

Aylesworth, Q. C., and *F. H. Thompson*, for the respondents. There was actual misfeasance; not mere nonfeasance as contended. The defendants actively interfered to the plaintiffs' detriment. It is not necessary to rely on the

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statute; there would be liability at common law. This is like, for instance, the case of a dangerous animal, such as a mad dog. A person can simply abstain from doing anything and protect himself and incur no liability, but if he captures the animal and keeps him for a time and then changes his mind and drives him to a neighbour's farm, he would without doubt be liable. The patient belonged to Mitchell and should have been kept there, though to what place he belonged or where he intended to go is immaterial. When he learned of the disease he refused to go, but was forced to go. Section 84 is imperative. The board of health may do what is there pointed out and may do nothing else. They assumed to act under the section but did not adopt the course there pointed out and have put the plaintiffs to expense, and the plaintiffs may recover as for money paid under compulsion for the defendants' benefit. Section 97 applies. The disease had "broken out" upon this particular individual, and there was an imperative duty to provide for him. The accident that the man had to go but a mile or two makes no difference. The sending him into another municipality is the vital point. In section 84 there is a facultative use of the word "may." There is a power for the public benefit coupled with a duty, and the course pointed out must be adopted: Maxwell, 2nd ed., pp. 105 to 111, 287, 297, 303. The penal clauses do not apply to such a case as this. They evidently refer to violations by individuals of regulations of the board. The penalties are payable for the benefit of the board. The defendants cannot raise any question as to the regularity of appointment. Admittedly the defendants were *de facto* the board, and that is enough. At any rate what was done amounted to the passage of a by-law. No notice of action was necessary and was given as a precaution, and is in form sufficient: *Kelly* v. *Barton*, *Kelly* v. *Archibald*, 26 O. R. 608. The expenditure was reasonable and was made in good faith, and there ought to be judgment against Dr. Hurlburt and a mandamus against the board to raise the funds necessary to pay the claim.

Idington, Q. C., in reply.

June 30th, 1896. BURTON, J.A.:—

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This case raises a very important question as to how far the members of a board upon whom a duty is imposed for the benefit of the public, where the members serve without any remuneration or emolument, are liable for a breach of that duty at the suit of a private individual, who has suffered a loss in consequence. For anything done by them in pursuance of the Act of course no compensation can be awarded for any damages sustained thereby, as the legal presumption is that the act causing the damage being within the statute must be a lawful act, but if they commit a breach of the Act or perform the duty cast upon them in an illegal or negligent manner to the injury of another, how does the matter stand?

It has been decided that there is no difference in principle arising from the fact that they are acting gratuitously and merely for the benefit of the public.

It was laid down in a well known case in the House of Lords, *Ferguson* v. *Earl of Kinnoull*, 9 Cl. & F., 251, in very broad terms, that if the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures, and that if several are jointly bound to perform the duty they are liable jointly and severally.

The same proposition was laid down almost as broadly by the Court of Queen's Bench, the judgment being delivered by Lord Campbell, that wherever a statutory duty is created any person who can shew that he has sustained injuries by the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed. That broad proposition was gravely doubted in a subsequent case, and the better opinion seems to be that much must depend on the purview of the legislation in the particular statute and the language that has been there employed.

I think there is a broad distinction to be drawn between cases of mere nonfeasance, where no claim for reparation

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will lie, except at the instance of a person who can shew that the statute under which the defendants act imposed upon them a duty towards himself which they negligently failed to perform, and a case of actual misfeasance.

The result of the decisions upon the subject appears to me to be that, especially where as here the Act is one of public and general policy, and the act complained of is mere nonfeasance, no action can be maintained by a private person unless, as I have said, he can shew that the Act imposed upon the defendant a special duty towards himself, but no case that I can find goes the length of holding than an action will not lie for actual misfeasance followed by injury. I think it may well be that in the former, that is for mere nonfeasance and omission of duty the defendants are in general answerable only to the public by indictment, information or otherwise as provided by law. I express no opinion upon this, as the defendants if liable at all are liable for negligence in the active execution of the trust, and it is an implied condition of statutory powers that when exercised at all they shall be exercised with due care, and that for acts of malfeasance or positive wrong, although springing from negligence or mistake, they are liable to answer in a civil action to any one specially injured thereby.

Wilson v. *Mayor of Halifax*, L. R. 3 Ex. 114, was a case of nonfeasance, but the decision was upon another point.

I may whilst upon this subject deal with the objections as to the only remedy being for the recovery of the penalty and the argument that the statute having provided penalties that may be regarded as an indication on the part of the Legislature that there should be no action on the part of the person injured. That proposition I should not for a moment contest if the penalties were imposed for breach of duty on the part of the members of the board especially if it was provided that the penalty should go to the party injured, however small and inadequate a compensation that might be.

But the penalties are not imposed for any breach of duty on the part of the members of the board.

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Section 106, sub-sec. 1, is confined to penalties against persons violating sections 87, 88, 89, 92 and 93. These sections apply to persons suffering from the diseases previously referred to or the owners of conveyances allowing them to be used by persons so infected, or persons selling or exposing any bedding, clothing or other article likely to convey any of the above diseases, or letting rooms which have been occupied by sick persons, or making false statements in reference to such rooms, and the other sections are equally confined to violations of the Act by members of the public, and do not extend to violation of it by members of the board.

It would seem to be quite clear that when a statute creates an obligation and enforces the performance in a specific manner, not only is the public remedy by indictment excluded, but also any rights of private persons apart from the statute creating the right, and the obligation, if unperformed, can only be enforced by the penalty. There is no penalty for any such breach of duty as is complained of here.

The case of *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187, has no application. That was an information against a medical man for an alleged infringement of the statute, for that being in charge of a patient suffering from scarlet fever, he had wilfully exposed that person without proper precautions in the public streets. The magistrate refused to convict, holding that he was not in charge of the patient and that he had not exposed him without reasonable precautions, and the Court held that they were right, the patient being of full age and a free agent.

This case is wholly different, the gravamen of the charge is that the defendants should not have allowed the boy to be at large, and to wander into an adjoining municipality, much less to send him there, which the learned Judge holds upon the evidence, (which I think amply supports his finding), these defendants did, in spite of the remonstrance of the reeve of that municipality.

The facts are fully stated in the judgment of the learned

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trial Judge and the duty imposed upon the local board of health is to be found in section 84, which should be read in connection with sections 81 and 97.

In case any person coming from abroad is infected with smallpox, the health officers or local board of the municipality where such person may happen to be, may make effective provision in the manner which to them may seem best for the public safety by removing such person to a separate house or by otherwise isolating him, if it can be done without damage to his health, and by providing nurses and other assistance and necessaries for him at his own cost, if of ability to pay, otherwise at the cost and charge of the municipality.

I agree with the learned Judge below, that this section is imperative, not permissive. The power is given for the benefit of the public and to prevent the spreading of a dreadful scourge, and I do not entertain the slightest doubt that the intent of the Legislature was not to devolve a mere discretion, but "to impose an absolute and positive duty." The discretion applies merely to the mode of carrying out the Act, but the removal to a separate house or otherwise securing isolation is a positive obligation.

I am, therefore, clearly of opinion that the learned Judge was right in holding that these defendants, the members of the board of health, were guilty of an actionable wrong at the suit of any person who has suffered an injury by reason or in consequence of that breach of duty. The next question is, does the township of Logan fall within that class.

The defendants are shewn to be wrongdoers, and I cite a passage from a judgment of Tindal, C. J., which I think very appropriate to this case:—"No wrong-doer can be allowed to apportion or qualify his own wrong, and as a loss has actually happened whilst his wrongful act was in operation and force and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he

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could shew not only that the same loss might have happened, but that it must have happened if the act complained of had not been done."

The plaintiffs were bound under the same Act of Parliament to take charge of any person infected with smallpox within their township, and I think the result of the cases to be this, that when negligence or misconduct of the nature here alleged is once shewn to exist, it carries a liability for the consequences arising from it, whether they be greater or less, until the intervention of some diverting force or until the force put in motion by the negligence has itself become exhausted.

I am of opinion, therefore, that the verdict against these defendants ought not to be disturbed. No reference is made in the judgment to the boy's inability to pay, and I was at first of opinion that the case would fail in consequence of an omission to prove that fact, which would seem to be a condition precedent to the liability of the plaintiffs; but I find in the evidence that there is a statement to the effect that the boy had no money and his parents were under no legal obligation to pay the expenses incurred.

I agree in the view that judgment was properly entered in favour of Dr. Hurlburt. He appears to have performed his duty faithfully and well, and he could scarcely be made liable when acting as the agent of the board in ordering the vehicle.

I think, therefore, that the appeal should be dismissed.

OSLER, J. A.:—

The Public Health Act, R. S. O. ch. 205, confers certain powers and imposes certain duties upon the local board of health of each municipality, and also provides means for exercising these powers and performing these duties. One duty is that mentioned in section 84, the breach of which has given rise to this action.

The health officers mentioned in the section are the members of the local board of health, or of the district

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board where two or more municipalities are united into a health district: section 50.

It is true that section 84 uses language which may at first sight appear permissive only, but when the object of the Act is considered it appears to me that the case is one of those in which the law requires an imperative construction, what is authorized to be done being something which the public interest demands for the suppression of a dangerous disease, and the means of doing it being placed within the control of those persons upon whom the power is conferred.

I regard the section, therefore, as one which imposes a duty upon the persons referred to in it to be performed when the occasion arises, the discretion reposed in them being limited to doing it in the way which they deem best and most effective.

In the case before us it was proved that a person came into the municipality from abroad who was infected with smallpox. His presence there was brought to the notice of the medical officer of the local board, by whose order and direction he remained in the room or office where he had been seen and examined by such officer until a meeting of the board could be called for the purpose of considering the case. The evidence shews that the man was passive and that he placed himself at the disposition of the board and their officer. He was willing to be taken care of in the municipality or to go where, or to do what, they told him. A meeting of the board was called at which the four appellant defendants were present, comprising all but one of the members of the local board. It is evident that they were not desirous of taking charge of the case though there was nothing which stood in the way of their doing all that the Act required them to do.

It appeared that the patient had stopped in Mitchell to consult a medical man on the subject of his illness, while on his way, after seven years' absence, to visit his parents in the township of Logan, their house being about three miles distant from Mitchell. The defendants thought that

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the best thing he could do would be to continue his journey, and accordingly a resolution was passed "that the young man be sent to his home in Logan." In accordance with this resolution the medical officer ordered a conveyance from a livery stable which was brought to his surgery where the young man had been waiting for about five hours pending the calling together and deliberation of the board. And he drove himself home, the charge of the stable being afterwards paid by his brother. It should be said that the defendants were warned by one of the local health officers of Logan, who happened to be present at their meeting, that they were doing an unlawful act, that their duty was to take care of the case themselves, and that if the township of Logan incurred expense in consequence, they would reclaim upon the defendants, or whoever might be found responsible. This warning was disregarded. The local board afterwards ordered that the account of their officer for professional services in connection with the case should be paid.

The plaintiffs afterwards, on the order of their local board, incurred and paid the charges sued for in this action in attending to the case of smallpox referred to, and another caused by it. The question is whether an action will lie to compel the defendants to repay these charges.

In speaking of the defendants, I mean the members of the local board of health—the health officers of the municipality who were present at the meeting of the board and concurred in passing the resolution above referred to.

I do not understand how it could ever have been thought that the town of Mitchell could be liable or the board of health *eo nomine*, which is not a corporation or capable of being sued as such.

Whatever difficulty there might have been in maintaining this action against the defendants had they merely neglected their duty, ignored the notice given to them by their medical officer of the existence of a case of the disease in the municipality, and simply left the patient to go on his way where and how he would, the aspect of the case which the evidence presents is very different.

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OSLER, J.A.

For mere nonfeasance, mere non-performance of the duty cast upon them by the 84th section of the Act, it may well be that the only remedy would be by indictment or prosecution for any penalty given by the Act appropriate to the case: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; *Hill* v. *Boston*, 122 Mass. 344. The Act in terms imposes no duty on the defendants towards the plaintiffs in particular. It is a duty towards the public at large for the benefit of the public, and not for the benefit of these plaintiffs in particular, and neither as a board nor as individuals do the defendants derive any profit or advantage from the performance of this duty. But a positive misfeasance directed towards and operating directly upon the plaintiffs, must, in my opinion, be regarded very differently. That is what these defendants have been guilty of. They not merely neglected to do what the statute required them to do, they actively determined when the case was brought before them and when it was in their power to control and attend to the patient, that they would not do so, and, more than that, resolved to send him on into another municipality. I think the proper inference of fact is as the learned trial Judge has found, that they did in fact do so.

The direct consequence of their action was that the latter municipality, whose local board performed its duty, was obliged to incur and pay charges which, had these defendants done theirs, would have been borne by the municipality of Mitchell. Under these circumstances it appears to me that an action will lie against the defendants on the principle that they have transferred a nuisance which they ought by law to have taken care of themselves into another municipality, upon whom on its coming there the cost of isolating and taking care of it fell, but upon whom it would not have fallen had the defendants not done what they did. On the distinction between mere nonfeasance and actual misfeasance as creating a liability, the cases of *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15

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App. Cas. 400 ; *Pictou* v. *Geldert*, [1893] A. C. 524, may be referred to.

The case of *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187, is a very different case from this. There the defendant was held not liable for the penalty sued for, because he could not be said to be in charge of the person infected within the meaning of the Act, which imposed a penalty upon any one who, being in charge of a person suffering from an infectious disease, wilfully exposed such person without taking proper precautions.

It was urged that the defendants were entitled to notice of action, but I think there is nothing in this objection, for it is impossible to hold that they could have really believed that they were acting in pursuance of the Act. For these reasons I am of opinion that the judgment should be affirmed.

MACLENNAN, J. A. :—

I have had much doubt about this appeal. The trial Judge and two of the learned Judges of this Court are of opinion in favour of the plaintiffs, and upon the whole I think that the better opinion. I think the question is one of great nicety. If the defendants are to be held liable, it seems to me it can only be because they were parties to the transfer of the sick man to the plaintiffs' municipality. If they had merely let him alone they would not be liable. It is argued that if they had let him alone the same thing would have happened. The young man would have gone to his mother, as he had intended to do. Another consideration suggested is that, therefore, what they did was not the cause of the injury to the plaintiffs ; that if it would have happened without their intervention, it was not caused by them. What they did was to request him to go to his mother, and they procured a horse and carriage to take him there, and requested him to use them for that purpose, and he did so. He was a free agent. He was at liberty to refuse to do what he was requested to do.

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MACLENNAN, J.A.

Even when he was seated in the carriage he was free to go, or not to go, or to go where he pleased. They did not even provide a driver. He drove away alone by himself, and what he did was his own voluntary act. Could the defendants be said to be acting in any way in respect of him after he was seated in the carriage? Can it be said that under these circumstances the defendants caused him to be removed into the plaintiffs' township?

It may be that the young man would have gone to his mother if the defendants had let him alone. I do not know; it may be so. If a person having no duty in the case had done what the defendants did, I incline to think he would not be liable. But it is impossible to leave out of consideration the fact that they had a duty, that they were persons in authority, and that as far as they could, without using actual force or compulsion, they ensured his removal. They exerted authority over him successfully, and thereby as I think caused his removal. That being so, I think they wrongfully did an act which cast a duty upon the plaintiffs, in the performance of which they have incurred expense.

I think, therefore, the defendants are liable, and that the appeal must be dismissed. The cross-appeal is also dismissed.

HAGARTY, C. J. O.:—

I feel a great difficulty on the facts in evidence to find anything beyond that the Mitchell board of health refused to interfere or take charge of the patient and let him proceed on his journey to his parents' house some three miles down the road. Had he not consulted the doctor in Mitchell he would unquestionably have been at his destination in Logan some hours earlier in the day. He was perfectly willing to be sent to the hospital or to be isolated and treated in Mitchell, but as soon as he found they would do nothing he resumed his journey. He was not aware, he says, that the doctor had locked his surgery door while off to consult the board.

Judgment.

HAGARTY, C.J.O.

He was a free agent, and waited to see if they would take care of him. On the question of his being a free agent, I refer to *Tunbridge Wells Local Board* v. *Bisshopp*, 2 C. P. D. 187, under the Imperial Act, where an infected person wilfully exposes himself, or against a person being in charge of such infected person so exposes such person.

I do not much regard the use of the word "sent" in the resolution of the Board, as the clerk thought proper to word it. We must look at the substance of what was done. It surely amounted only to this: "we can do nothing for him; let him go on to his people in Logan, as he was proceeding to go."

I cannot understand this proceeding as an active commission of a wrong, but simply as a nonfeasance—an omission to do what might have been done.

He might have been on his way to some place half a dozen townships beyond Mitchell. In each he might be known or discovered to be an infected person; each township might decline to interfere, and he be speeded on his way to his destination. His own township, where he finally stopped, expends some $700 in stamping out the disease in his mother's house, where he was isolated.

On the construction of the statute urged before us, every township through which he passed and which knowingly refused to interfere and stop him, would be liable to pay. If he had been kept and treated in Mitchell, it seems clear it would have been wholly at the cost of Mitchell.

But for the accident of his consulting a doctor there, within an hour's drive of his mother's house, he would certainly have reached there, and must have become a charge to Logan.

Treating Seebach as a young man who had come originally from Logan and had been absent six or seven years, and was now coming back to visit his parents, well-known residents, was it an unreasonable action on the defendants' part to consider, as Mitchell had no appliances ready for such a case, that he had better proceed on the hour's further journey to the parents' home?

Judgment.

HAGARTY, C.J.O.

On the plaintiffs' argument, the defendants would still be liable, even if they honestly believed that he could be better treated in Logan, where we will suppose there was an isolated hospital for such cases. If this view be correct, the obligation becomes complete on the defendants' refusal to interfere to indemnify any municipality which had to expend money in treating the case.

As to the objection of want of notice of action, the learned trial Judge held it was not necessary, as the defendants were not charged with doing any act in execution of or under the Public Health Act; that there was a total absence of authority for doing that which has been done, and therefore that they were not entitled to the protection of public officers fulfilling a public duty; that the defendants abused the authority which they had as health officers and as a board of health; that they acted under the guise of the Act, but in direct contravention of it.

In the view I take of the evidence, I hardly see how notice of action was necessary. As I consider the charge of "sending" the infected person into Logan wholly unwarranted, the whole complaint seems to resolve itself into nonfeasance, that in fact they did nothing and were not acting under any statute or executing any duty or function of a board of health.

The incorrect wording of the resolution drawn up by the clerk cannot make it a "sending," when no such sending in fact took place.

The man was a perfectly free agent (as said in the *Tunbridge Wells* case) and was left to pursue his intended journey as he pleased.

The charge seems that the defendants could have stopped his going into Logan, as he was in the act of doing, but they omitted to do so.

I doubt very much whether the 84th section covers a case of this kind. The man "coming from abroad or residing in any municipality," can hardly apply to the case of a man from abroad and simply passing along from the railway station at Mitchell just across the line between it and Logan, to which he was bound.

Judgment.

HAGARTY, C.J.O.

Whatever be the final result of this case, I think the learned trial Judge was right in dismissing the action as against Dr. Hurlburt. The English case already cited is strikingly in his favour. When he understood that Seebach, finding that they would do nothing for him, was resolved on continuing his journey to his parents' house, the doctor assisted him to hire a vehicle to carry him the short distance, at Seebach's own expense.

The case seems to be one of the first impression, and I cannot bring myself to hold that these defendants are liable to the extraordinarily heavy charges sought to be thus fastened on them personally. There is no evidence to warrant the belief that their omitting to act made any difference in the result or as to the spread of the disease. Expenses had to be incurred, and it was merely a question as to which municipality should bear the burden.

Penalties are provided by the Act in specified cases, and also generally (sec. 106, sub-sec. 2), where any person violates any other provisions of the Act. The effect of inflicting it on any of these defendants (the board of health) would be, under section 110, that every penalty recovered under the Act was to be paid to the municipality for the use of the local board of health. Generally when penalties are provided by a statute, an action for non-observance of the provisions is not allowable: see *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441.

I assume that a criminal information by the Attorney-General would lie for neglect of statutable duties by officers charged with duties respecting the public peace, health or safety.

Appeal dismissed, HAGARTY, C. J. O., *dissenting.*

Fleming v. London and Lancashire Life Assurance Company.

Insurance—Life Insurance—Premium Notes—Discount Thereof—Non-payment.

To cover the first premiums upon two policies of assurance the assured gave to the company's agent his promissory note, and the promissory note of his brother, payable to the agent's order. Each policy contained a provision that in the event of non-payment of a note given for a premium the policy should become void. The agent discounted the notes with his own bankers, and in his return to the company treated the premiums as paid, and the company took from him his own note in their favour to cover the balance due by him, which included other premiums. The notes given by the assured and his brother to the agent were not paid, and after their maturity and dishonour the assured died :—

Held, per Hagarty, C. J. O., and Burton, J. A., that what took place between the company and the agent was not equivalent to payment of the premiums, and that, there being no misrepresentation by the agent or misleading of the assured, his representatives could not recover.

Per Osler, and Maclennan, JJ.A., that by discounting the notes the agent received payment of the premiums, as between himself and the company, and the subsequent non-payment of the notes was entirely a matter between the agent and the makers.

In the result the judgment of Meredith, C.J., in favour of the assured's representatives, was affirmed.

Statement. This was an appeal by the defendants from the judgment of Meredith, C. J., reported 27 O. R. 477.

The action was brought to recover the amount of two policies of assurance of $5,000 each on the life of James Fleming, and was tried at Toronto on the 27th of January, 1896, before Meredith, C. J., who, on the 11th of March, 1896, gave judgment in favour of the plaintiff. The contention of the defendants was that the premiums had not been paid, and the facts in reference to this contention are set out in the report in the Court below.

The appeal was argued on the 1st of June, 1896, before Hagarty, C. J. O., Burton, Osler, and Maclennan, JJ. A.

Robinson, Q. C., and *W. Nesbitt*, for the appellants.
Osler, Q. C., and *J. R. Roaf*, for the respondent.

June 30th, 1896. HAGARTY, C. J. O. :—

Judgment.

HAGARTY, C.J.O.

It seems clear that the assured never paid any money on his first year's premium; that he gave notes therefor instead, not to the company but to their agent, as if it was a transaction between them individually, payable to his order at the office of a Toronto private bank, no reference whatever appearing thereon as to the defendants. The company have regularly printed forms of notes, payable to themselves, for use if required. These notes were discounted by the agent with his own bankers and stamped as their property. The agent gave to the assured a receipt for his note, being for the first premium on his insurance, on the ordinary printed receipt of the company. It was part of the condition of the contract that the policy should not have effect till the first premium was paid, and that if a note taken for the first or renewal premiums should not be paid when due, the policy should become null and void, but the maker of the note should remain liable to pay same.

The case is free from any difficulty as to the assured having been misled or deceived by the defendants or their agent, or of having paid any money which has been intercepted or misapplied by the agent. If he had duly paid his notes at maturity, there need have been no difficulty.

The ground on which the plaintiff seeks to recover, notwithstanding the default, is rested almost wholly on the dealings between the company and its agent.

Assuming that the premium had been actually paid, they debited him with the amount and took from him at the end of the month his note at a short date for the amount of this and one or two other premiums. This apparently was not an uncommon proceeding between them.

The life dropped in June, only six or seven months after the risk had been taken. Up to the time of death the company had always been under the belief that the premium had been duly received by the agent. Both notes by the assured were overdue and unpaid.

Judgment.

HAGARTY, C.J.O.

I find great difficulty in holding that the plaintiff can be heard to urge that by debiting the premium to the agent or taking his note therefor the premium must be considered as paid.

If the company knowingly took the agent's obligation to pay in substitution for or satisfaction of their claim on the assured, we can understand such a contention.

But has the assured a right to treat what did take place here as equivalent to payment? If the agent had given the assured to understand that he had duly paid the amount for him or that the company had accepted his note as payment therefor, it would have introduced the element of misrepresentation and deceit practised on the assured to his serious detriment. No such question arises here.

The case of *Acey* v. *Fernie*, 7 M. & W. 151 (1840), has a strong bearing on the rights of the assured to take advantage of arrangements between the company and their agent. There the premium was payable on the 15th of March. The rule was that if not paid within fifteen days at latest, the receipt should be returned to the head office and the insurance cancelled, and immediate notice given.

The premium was paid to the agent on the 12th of April, outside the fifteen days, and a receipt was given by him. No notice was given to the company of non-payment within the fifteen days, and according to the usual practice the premium was entered as paid on the 15th of March (the proper day) and the agent debited with the amount.

Lord Abinger, who tried the case, held the defendants not liable, and on the argument in term he said: "It seems to me that the provision, that he should be debited as if the premium was paid, was to operate as a penalty on him; but does not authorize third persons to take advantage of that which was a mere private arrangement between the company and the agent, for the purpose of insuring the due payment of all moneys received by him."

Parke, B., said: "It is impossible to consider the debiting of the agent with the amount of the premium as a

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HAGARTY, C.J.O.

payment on the original day, according to the allegation in the first count: the only question is, did the company mean to make themselves liable as on a new contract? It seems to me that they did not, and that the meaning of the transaction was merely to keep their agents right, and in case of neglect to be able to come upon them for the amount of the premium by way of penalty * * . It is only on the ground that they became liable upon a new contract, that anything can be made of the case on the part of the plaintiff."

This case is discussed in Bunyon's Law of Life Assurance, 3rd ed., pp. 88, 253, 256, with reference to the American cases. It is also noted with approval in *Busteed* v. *West of England Fire and Life Insurance Co.*, 5 Ir. Ch. 553, at p. 569 (1857).

The question for decision here is not depending on the extent of the authority given by the company to its agent. It is almost wholly as to whether the company by debiting the premium to their agent or taking his note therefor in the belief that he had received the premium can absolve the assured from his default.

It seems to me that both by reason and authority the assured cannot take advantage of any such arrangement as here shewn, to which he was no party, and which was merely a matter between principal and agent for the convenience of their business.

The assured was wholly in default, and was in no particular misled or deceived.

All the proceedings of the agent seem to have been strangely irregular—taking notes to himself payable at his private bank without any reference to the subject matter of insurance for which they were given.

I cannot see how the discounting of these notes by the agent for his own purposes, turning them as it were into cash, can help the assured. The company, I assume, could discount or obtain an advance on such notes, payable to itself, without in any way discharging the maker from the liability to pay at the proper time.

I am wholly at a loss to understand the action of the

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HAGARTY, C.J.O.

company in paying the amount of the notes to the discounters and thus obtaining possession of them. Whatever may have been intended, I do not see how it alters the rights between them and the assured.

It is specially argued that as the company reserves the right of collecting the amount of the notes, notwithstanding the lapse of the insurance by default, that they are thus enabled to pay themselves out of the insurance moneys. That is not the point for decision. The legal consequences of default in payment as agreed worked a forfeiture of the insurance. If the life had dropped before default in payment of the first note, they might have had to pay.

The decision must not be made to depend on whether the company were in no worse position than if the assured had regularly paid the premium in cash to the agent, who had never paid his note therefor to his employers.

I consider that the assured was wholly in default and that the appeal must be allowed.

I am aware of the conflicting American decisions as to the great latitude allowed to agents for insurance companies. One of their text writers (May on Insurance, 2nd ed., sec. 136), remarks that the weight of authority seems against the law of *Acey* v. *Fernie*, 7 M. & W. 151.

BURTON, J. A. :—

I find that on the close of the argument I made this note : " I have come to a clear conclusion that judgment ought to be given for the defendants." A subsequent examination of the evidence has confirmed me in that opinion.

It was suggested by counsel for the plaintiff that it was a matter of common occurrence for an assured not having the cash in hand to apply to the agent to discount his note and pass the proceeds to the payment of the premium. I cannot say how that is, but if that had been the case here the defendants would presumably not be before us, as

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BURTON, J.A.

nothing can be clearer than that whether the agent misappropriated the money to his own use or not the company would be liable to make good the policy to the assured.

But there is not a particle of evidence of any such dealing in this case; on the contrary, the inference to be drawn from the evidence is all the other way.

The agent had no authority to deliver the policy to the assured except upon receipt of the premium in cash unless the company agreed to accept a note approved of by them on the forms specially prepared for the purpose and in which they are named as the payees.

It is said that the fact of the notes being made payable personally to the agent and made payable at a bank is some evidence of an agreement between the applicant and the agent to discount them for him and apply the money on his premium. To my mind it affords no such evidence, even if it stood alone, but White gives no such version. Robert Fleming is not called, and it is directly at variance with the receipt produced, which shews that it was not given for the purpose of being discounted and paying the premium from the proceeds, but that it was given and accepted as the first premium.

It affords, I think, very cogent evidence that the agent contemplated from the first making an improper use of the notes and negotiating them for his own purposes, but not the most remote evidence of an agreement between the applicant and the agent to raise money for him to pay the premium.

I think, therefore, we may reject any such theory as that the notes were given for any such purpose.

The notes were not then and there discounted for the purpose of raising the necessary funds to pay the premium, but one was discounted on the 22nd of December and the other at a much later period.

The certificates of acceptance sent by the company to the applicant were duly delivered to him and express upon their faces that the policy to be issued is subject to

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the terms and conditions of such policy under the plan of assurance applied for.

The applicant was aware that he had paid nothing in cash and that by the terms of the policy it would be void if the note he had given was not paid at maturity, and under these circumstances no possible liability could exist against the company unless its dealings with its own agent could be invoked by the applicant as something intended for his benefit. But upon what principle? It is "*res inter alios acta.*" If the company had chosen for any reason of its own to make a present to the agent of any arrears in his hands which he ought to have paid over, how is that any affair of the assured?

There is nothing, as the learned Chief Justice remarks, to prevent the company taking the note of a third person in satisfaction of a premium, but there is nothing to warrant the conclusion that this note of the agent was accepted upon any such terms. The agent had not received any money in payment of the premium; if he had, that in itself would, as I have said, been sufficient to fix the company with liability. He led them to suppose, contrary to the fact, that he had been paid the premium with others, and the company, under the idea that that was true, agreed to wait a short time for them, taking his own note or an endorsed note, as the fact may be, for their payment. They afterwards discovered that no money had been received by him as their agent at all, and that the assured had never paid any portion of the premium.

On discovering the facts the company promptly repudiated the transaction, and declined to do anything which might be construed into an adoption of the pretended receipt of money on their behalf, as they were quite justified in doing.

Whilst in ignorance of the true facts, the manager, under a mistaken view of his rights, treated the $135 note as being subject to the same condition as the notes taken originally for the premiums. In this he was in error. But why should the assured profit by that error? The com-

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pany may lose the arrears due by the agent by neglecting to enforce the payment as soon as they might have done, but why should that act enure for the benefit of this assured, who never has paid his premiums, and is in no way prejudiced by the defendants' action?

I must confess I do not understand why the company were advised to retire the notes in the hands of the bankers, the holders; it was probably a fortunate thing for the bankers, but I do not see how it affects the liability of any of the parties in this proceeding.

I think we ought to allow the appeal and dismiss the action.

OSLER, J. A.:—

I have had an opportunity of reading the judgment prepared by my brother Maclennan, and I think, for the reasons given by him, that the appeal should be dismissed.

MACLENNAN, J.A.:—

I am of opinion that this appeal should be dismissed, and I agree substantially with the reasons for his judgment given by the learned Chief Justice in the Court below.

I do not think this case is governed by any of the cases to which we were referred. It is sworn and not disputed that the notes given by the assured to the agent, the one dated the 19th of November, and the other the 10th of December, were transactions not between the assured and the company, but between the assured and the agent White. They are not drawn upon the company's forms, but upon forms of Burk & Graham, who were the agent's bankers. They were not, at any time, the property of the company, nor intended so to be. One was discounted by White with his own bankers, on his own endorsement, on the 27th of November, and the other on the 22nd of December, 1894. On the same day on which the first note was discounted, White sent the application for insurance

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to the head office. The application, in the first instance, was for $5,000 insurance only, and when that was sent forward, White had in his hands, as the proceeds of the note given by the assured, a sum of cash more than sufficient to pay the company's share of the premiums not only for a policy of $5,000, but for two such policies. Between the 27th of November and the 5th of December, it was agreed between the assured and White to make the application one for $10,000 in two policies of $5,000 each, instead of what was first intended, a single policy for $5,000. The application was accordingly changed from $5,000 to $10,000, and on the 5th of December formal acceptances for both policies were issued at the head office.

These were delivered to the assured, and it was after that, on the 10th of December, that the second note for the premium on the second policy was given. It was not the note of the assured but the note of his brother, Robert Fleming, and that was discounted on the 22nd of December. After the 22nd of December, therefore, the agent White had in his hands actual cash applicable to these premiums, and which, having regard to all that had taken place, was the undoubted money of the company, less the proportion thereof due to him for his commission. It was the company's money, not only as between them and White, but it was so also as between White and the assured. If that was so, then the premiums were actually paid in cash, and when afterwards, on the 23rd of January, 1895, the policies were sent forward by the head office and delivered to the assured, the insurance became absolute for one year, and the payment of the notes was entirely a matter between the agent and the makers. The only circumstance indicating that the notes were not intended to be the property of the agent, is the form of the receipt which was given for the first note. One of the company's forms was used, and it is signed by White, describing himself as agent. It is, however, expressed to be the personal receipt of the agent, and the undertaking to return the note, in the event of the non-acceptance of the application, is the personal

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undertaking of the agent. I think, therefore, this circumstance is wholly insufficient to overcome the positive testimony that the giving of the notes was a private transaction with the agent, for the very purpose of raising the money for the premiums, and that the notes never were the property of the company. It does not appear whether any, or if so what, receipt was given for the second note; probably not any, for by that time the interim acceptance receipts had been issued by the company for both policies. This view of the case is in my judgment confirmed by the acceptance of White's note by the company on the 31st of December, for the balance owing by him to them, on the assumption of his having received the premiums in question. I see no reason why an agent should not assist an intending insurer to raise the money for his first or other premium by taking his note, as his own personal property, and getting it discounted; nor do I think the stipulation in this company's agreement with their agent, requiring all premiums to be paid in cash, or notes approved by the company, and not otherwise, forbids that to be done.

I think the appeal must be dismissed.

Appeal dismissed, the members of the Court being divided in opinion.

GREEN v. MCLEOD.

Evidence—Corroboration—Executors and Administrators—Action by Administratrix.

The "material evidence" in corroboration, required by the Evidence Act, R.S.O. ch. 61, in an action by or against the heirs, executors, administrators or assigns of a deceased person, may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement.

In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the moneys in question were paid in due course to the deceased is sufficiently corroborated by shewing that the deceased, a close, careful, intelligent man, who lived for over a year after the transactions in question, and during that time saw and conversed with many persons, continued to entrust her with his business, and made no complaint of the non-receipt of the money.

Judgment of ARMOUR, C.J., affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of ARMOUR, C.J.

The plaintiff was the administratrix of the estate of Alexander McLeod and brought the action to recover from the defendant, who was a sister-in-law of the deceased, $1,537.82, which the plaintiff alleged the defendant had received on behalf of the deceased and had not accounted for. The defendant admitted that she had received from the deceased two cheques, making the amount in question, but alleged that she had at his request drawn the money from the bank as his messenger, and had paid it to him.

The action was tried at Woodstock, on the 16th October, 1895, before ARMOUR, C.J., who dismissed it with costs.

The plaintiff appealed and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th of June, 1896.

Aylesworth, Q.C., and *Ball*, Q.C., for the appellant. The plaintiff established her case and the only evidence in explanation was that of the defendant. That evidence has not been in any respect corroborated, and therefore the statutory bar imposed by section 10 of R. S. O. ch. 61,

applies, and the defendant cannot obtain judgment in her favour in this action on her evidence in respect of matters which occurred before the death of Alexander McLeod. Argument.

Osler, Q.C., and *W. T. McMullen*, for the respondent. The onus of proof was upon the plaintiff and that onus is not satisfied unless the evidence of the defendant is given effect to. If, however, the admission of the defendant that she received the moneys in question is given effect to, so, also, must her statement that she handed the moneys over to the deceased. It is shewn that the deceased was a very close and careful man, and it is shewn also that no complaint was made by him of the non-receipt of the money in question, although he lived several months after the time of the cashing of the cheques, and this is in itself a sufficient corroboration of the evidence of the defendant.

Aylesworth, Q.C., in reply.

June 30th, 1896. HAGARTY, C.J.O.:—

I think the learned Chief Justice was right in dismissing this action and that we must do the same with the appeal.

The suggestion of forgery was withdrawn or abandoned, and we have the genuine signature for the payment of the money. Apart from the defendant's evidence, I think it incredible that having given these cheques or orders the deceased should for over a year, in his usual carefulness and miserliness about his money, have remained in ignorance as to these moneys.

It was shewn that for ten or eleven years the defendant had been in the constant habit of getting his money on his cheques when required. It is far easier to believe that these moneys were duly paid to him when received, than that the defendant, during the last year of his life, had forged his name and obtained his moneys without his becoming aware of the fact.

I think it impossible in a case like this to accept Mr.

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HAGARTY, C.J.O.

Aylesworth's argument, that as she received the money as his messenger at the bank, the whole burden of proving actual payment to him thereof is thrown upon her and that her testimony requires positive corroboration.

OSLER, J.A.:—

The case made by the plaintiff is that the deceased on or about the 30th of December, 1893, entrusted the defendant with a Government Post Office Savings Bank cheque on the Imperial Bank for $1,037.82, with instructions to go to the bank and get it cashed for him, and bring him the money; that she did then get the money from the bank: that afterwards, on the 24th of January, 1894, the deceased gave the defendant his own cheque for $500 on the Molsons Bank with similar instructions, the money for which she also received. The deceased died on the 22nd of March, 1895, and soon afterwards the plaintiff, as his administratrix, brought this action to recover the moneys in question, alleging that the defendant had not paid them over to the deceased. The defendant's answer is that she handed over to him the amount received from the bank as soon as she returned to the house. The plaintiff contends that her evidence has not been corroborated as required by section 10 of the Evidence Act, R. S. O. ch. 61, that is to say by "some other material evidence."

In my opinion it has been so corroborated. The language of the Act is very general: "Other material evidence" is the expression, and this may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement.

In *Radford* v. *Macdonald*, 18 A. R. 167, I stated what I believe to be the rule applicable to cases under the Act, viz.: That if the evidence offered is admissible, if it supports the evidence of the party, it is corroborative evidence and it is then for the judge or jury to say what weight should be attached to it. In other words, it must be rele-

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vant and material, and calculated to lead to the belief that the evidence of the party is credible. The authorities on the subject are all referred to in that case and need not be repeated except to point out that in *Cole* v. *Manning*, 2 Q. B. D. 611, a case under the Bastardy Act, the words of which are, "corroborated in some material particular by other testimony," the evidence which was held to be sufficient for that purpose was in the strictest sense evidence shewing merely a probability that the statement of the plaintiff was true.

In the case at bar it is proved that the deceased signed the usual requisition, dated the 1st of December, 1893, for payment out to him of the money deposited in the Government Savings Bank, that he endorsed the cheque which was sent to him for it, that this cheque was paid on the 30th of December, 1893; that on the 24th of January, 1894, a cheque was drawn by deceased on his account in the Molsons Bank for $500 and cashed on the same day; that he survived for fourteen months afterwards; that he had been in the habit of sending the defendant, who was his sister-in-law, and had for a long time lived with and taken care of him, to the bank to get cheques cashed for him, though these were for comparatively small amounts; that notwithstanding his great age and infirmities he was capable of attending to his business; that he was a man of close, penurious and miserly habits, very fond of his money, looking after it carefully and keeping his affairs very much to himself. There is absolutely nothing beyond suspicions suggested in argument to shew that he did not know that he was drawing these large sums from the savings bank and his own bank. Persons not infrequently saw and conversed with him, and he was able to go out of the house into the town and occasionally did so. Under these circumstances, there being no evidence of fraud on the part of the defendant in connection with the requisition for the savings bank deposit or the drawing of the cheque on the Molsons Bank, the fact that she was entrusted with the latter nearly three weeks after she

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received the money for the former, affords cogent evidence of the probability of the truth of her assertion that she had handed over the money to the deceased in the ordinary course. And as to the other sum received by her—indeed, as to both—the fact of the deceased having survived her receipt of it for some fourteen months and having made no complaint of the defendant's conduct in connection with it, though he had ample opportunity of doing so, tells in her favour with equal force. These are circumstances which are material, which are relevant, which could not have been rejected. I think they amount to material evidence in corroboration of the defendant's evidence within the meaning of the Act. The great age of the deceased, his peculiar habits, that no trace of the money could be found after his death, were all circumstances proper to be considered in connection with the defendant's testimony, and no doubt the learned trial Judge gave due weight to them. He has found that the defendant's evidence was credible and corroborated, and I see no reason to disagree with his finding. I do not think it necessary to consider whether other defences might not be open to the defendant. The appeal should be dismissed.

BURTON, and MACLENNAN, JJ.A., concurred

Appeal dismissed.

NIAGARA DISTRICT FRUIT GROWERS STOCK COMPANY v. WALKER.

Principal and Surety—Guarantee Bond—Non-disclosure.

An agent was engaged by the plaintiffs from year to year for four years to sell fruit on their behalf on commission, one of the terms of the engagement being that all moneys received by him on behalf of the plaintiffs should be paid in from day to day to their credit in a named bank. The agent made default in this respect, and a large balance was due by him to the plaintiffs at the end of each of the first three years, and the plaintiffs at the end of each year took his note for the amount due, payable in the next year. In each year he gave a bond to the plaintiffs to secure the faithful performance of his duties and the prompt payment of moneys received. The defendants were the sureties in the bond given in the fourth and previous years, and entered into the contract of suretyship without making any enquiries from the plaintiffs. This action was brought against them to recover the balance due :—

Held, reversing the judgment of STREET, J., that the plaintiffs should have informed the sureties of the previous defaults, and not having done so could not enforce the bond.

Statement.

THIS was an appeal by the defendants from the judgment of STREET, J.

The action was brought against a former agent of the plaintiffs and his bondsmen, to recover the amount due by the agent in respect of sales made by him.

The following statement of the facts is taken from the judgment of MACLENNAN, J.A. :—

The plaintiffs are themselves an agency company, and their business is to sell fruit for the growers or producers thereof on commission. They employed the defendant R. B. Walker, to act as their agent at London, to receive, take charge of, and to sell the fruit and produce which the company's customers might send to him. They had a written contract with him, dated the 2nd July, 1894, in which he covenanted with them : 1. To act as their agent for seven months from date, to receive, take charge of, sell and dispose of for cash only, all fruit or produce shipped or forwarded to him from time to time by the company's customers; and for the purposes of the agreement, payments made within seven days, but not later, after sale or disposal, were to be considered as cash. 2. To keep full and correct entries in a book to be kept for that purpose of

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the following matters and things, namely: (1) The quantity of fruit and produce contained in each consignment. (2) The name of the person from whom received. (3) The date when received. (4) The names in full of the persons or firms to whom sold. (5) The date of the sale. (6) The selling price. (7) The sum of money received. (8) The date when received. (9) The amount of freight and other expenses paid. 3. He was at all times during the continuance of his engagement, diligently and faithfully to employ himself in the performance of his duties as agent.... 5. He was, well, truly and faithfully, to account for and promptly pay over, daily and every day, to the credit of the company at the Traders Bank, all and every sum and sums of money which should, from time to time, or at any time, be received or come into his hands, and conduct himself with fidelity, integrity and punctuality, in and concerning the matters and things which should or might be reposed or entrusted to him in the course of his employment. 6. He was to give and render to the company just and true accounts, daily and every day, unless otherwise directed by the company, of all moneys, business dealings and transactions whatsoever, in relation to the company's business. 7. He was, on every Tuesday, to render to the company's secretary and president, a complete statement according to forms furnished for that purpose by the company, of the business done during the week ending on the Monday of the same week—each business week, for the purpose of such statements, to begin on Tuesday morning and to end on the following Monday evening.

The company were to pay him monthly, as long as the engagement lasted and he fulfilled its terms, a commission of seven per cent. on gross sales when the money for all sales had been deposited in the bank to the company's credit. Such commission was to be in lieu of salary and all expenses, and he was to be responsible to them for the selling price of all goods sold by him, whether he should actually receive the purchase price or not, and he was to bear all the risks of bad debts arising from such sales.

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It was also provided that in the event of any neglect or violation on the part of the agent of any of the foregoing covenants, conditions or agreements, the company might forthwith discharge him, and the company were to furnish him with an agency book, agent's tissue account sales book, tags, weekly report forms, monthly report forms, and agent's pay-sheets, which were to be returned to the company, together with all other books used by him in the business, at the expiration of the term of the employment.

The company required Walker to furnish sureties for the performance of his duties under the agreement, and they gave him a printed form of bond for the purpose, and he procured it to be executed some time after the date of his agreement, and that is the bond on which the appellants have been held liable in this action. It recites the employment of Walker by the company as their agent, and that the bondsmen had become sureties for his faithfully serving and accounting to the company in manner after mentioned so long as his service continued, and the condition is that he should faithfully serve, and should, from time to time, and at all times, promptly account for and pay over and deliver up to the company all moneys, securities for money, goods and effects whatsoever, which he should receive for the use of the company or their customers and should not embezzle, withhold or allow, or permit to be embezzled or withheld, any such moneys, securities for money, goods and effects as aforesaid, or any books, papers or writings, of the company.

There had been a similar contract between the company and Walker, and a similar bond of suretyship by the same bondsmen, during the three preceding years.

This action is on the bond of 1894, to recover from the sureties a sum of $1,774, which, it is alleged, Walker, the agent, received for the plaintiffs, but failed to account for, and the defence is that he was unfaithful in the former years to the knowledge of the plaintiffs, and had, in these years, with their knowledge, appropriated money of theirs to his own use; that on employing him again in 1894, the

Statement. plaintiffs held him out, contrary to the fact, as a trustworthy agent, and that the bondsmen became his sureties in ignorance of his defalcations, and in the belief that he had theretofore been faithful.

The action was tried at Hamilton on the 17th of January, 1896, before STREET, J., who gave the following judgment in favour of the plaintiffs :—

STREET, J. :—(after stating the facts).

I find that there was no fraudulent concealment on the part of the company or its officers. I think they acted in perfect good faith in the matter, and that their assent to the principal debtor's request not to notify the sureties that he was behind in his accounts was not prompted by any idea or intention of withholding from them facts which they deemed it important the sureties should know.

I cannot read the authorities as requiring that facts such as existed here must be voluntarily made known by the creditor to the sureties as a condition precedent to his right to obtain a valid security from them. If inquiries are made by the persons proposing to become sureties, the creditor is of course bound to answer truly, but there is no obligation of voluntary disclosure on his part of circumstances such as here exist, for they come within the category of facts as to which the creditor may be reasonably presumed to have remained silent from perfectly innocent motives : *Railton* v. *Mathews*, 10 Cl. & F. 934 ; *Hamilton* v. *Watson*, 12 Cl. & F. 109 ; *Lee* v. *Jones*, 17 C. B. N. S. 482 ; *Mackreth* v. *Walmesley*, 51 L. T. N. S. 19 ; *Meaford* v. *Lang*, 20 O. R. 541.

There should, therefore, be judgment for the plaintiffs against the defendants for the amounts claimed in the statement of claim, with interest from the 18th of July, 1895, limited in the case of the executors to the assets of their testator in the usual way. The defendants must pay the costs of the action.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 28th and 29th of May, 1896. Argument.

Armour, Q.C., and *W. S. McBrayne*, for the appellants. The plaintiffs knew when the bond in question was given that Walker had made default and was indebted to them in respect of his former dealings, and yet they impliedly held him out as trustworthy, and that conduct is a fraud on the sureties and renders the bond void. The plaintiffs should have disclosed the fact that shortages had occurred in connection with the transactions of former years and should not have allowed the sureties to enter into the new engagement without explaining to them the nature of the arrangement made with Walker. The plaintiffs are now attempting to collect from the present sureties the deficiency of the previous years and their motive in not making disclosure is immaterial.

Moss, Q.C., and *G. W. Meyer*, for the respondents. The learned Judge at the trial finds that the plaintiffs acted in perfect good faith in the matter, and in view of that finding it is impossible for the sureties to successfully contest their liability. The plaintiffs had no communication with the sureties at any time and merely agreed to accept them as sureties at the request of the agent Walker. No representation whatever was made by the plaintiffs as to Walker's trustworthiness and the sureties, who were related to him and lived in the same place with him, were the persons best able to judge as to his financial and moral responsibility. This is an attempt by them to escape from payment of a just claim.

Armour, Q.C., in reply.

June 30th, 1896. OSLER, J. A. :—

It appears to me that there is abundant evidence that Walker was a defaulter to the plaintiffs for money which he had actually received for them and had not paid over

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during the years 1891, 1892, and 1893. For these defaults the sureties on the bonds given by him for his fidelity and due accounting for moneys received by him were liable, and might have been compelled to make them good if their principal had not afterwards made settlement satisfactory to the plaintiffs. But each of these defaults, and all of them together, shewed that Walker was not a trustworthy person. His default for the year 1893 was, at his request, specially concealed from his sureties, or at least not communicated to them by the plaintiffs. During the several terms of his employment for 1891, 1892 and 1893, he committed breaches of duty for which the plaintiffs might have discharged him; yet they reappointed him as their agent for 1894, and procured a renewal of the contract of suretyship from these defendants similar to that which they had given for the previous years, and without disclosing the successive defaults of which their principal had been guilty, and which had, it would appear, been made up from time to time out of the following year's business. The same thing occurred in 1894. Again the principal made default, and again much of what he earned during the year went to make good his former defalcations. The sureties complain, and I think with reason, of the non-disclosure of these repeated defalcations, when they were asked to continue or renew their guaranty of the principal's fidelity and honesty. I think it is evidence of a fraudulent concealment on the plaintiffs' part upon which the sureties may justly rely as a defence to this action, a proposition which it appears to me is fully supported by the cases of *Railton* v. *Mathews*, 10 Cl. & F. 934; *Smith* v. *Bank of Scotland*, 1 Dow 272; *Lee* v. *Jones*, 17 C. B. N. S. 482; Pollock on Contracts, 6th ed., pp. 516, 517. See also *Mackreth* v. *Walmsley*, 51 L. T. N. S. 19.

I think that the appeal should be allowed.

MACLENNAN, J. A.:—

The facts of the case have certainly not been brought out as fully as they might have been on either side, and

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my learned brother Street found against the defence, and that the plaintiffs had no knowledge which it was their duty to communicate to the proposed sureties. He found that although Walker was behind in his payments he was in the habit of explaining to the company that the balances due from him to them were represented by sales which he had made on credit and which were slow in being paid, and that there was nothing to shew that they disbelieved or had any reason to disbelieve these statements. The question for our decision is whether that is the proper conclusion upon the evidence. It has been strenuously contended by Mr. Armour that it is not. There is no doubt that at the end of each of the former years of his employment the agent was behind with his payments. On the 31st of January, 1892, the balance which he owed was $1,203; on 31st January, 1893, it was $1,269.19; on 1st February, 1894, it was $1,039.51 besides a balance on a note of $277. These balances were settled in each year partly by deposits, partly by notes taken from purchasers of fruit, and partly by the debtor's own endorsed note. Now, the existence of these balances alone, and the settlement of them in the manner mentioned, are in themselves, as I think, of little importance without evidence of the manner in which the balances arose. While the agreement provides that sales were to be for cash, that was not so in reality, for it was explained that payments made within seven days should be regarded as cash. Therefore Walker was authorized to sell on seven days' credit. If he did so, and the purchaser did not pay, Walker was bound by the agreement to make it good, he had to take the risk of all bad debts; but non-payment in such a case would not be misconduct on his part. It would be a mere debt which he was bound to pay. Such a case, too, would not be within the bond of the sureties, for all that they bound themselves for was that he would be faithful in his service and would promptly account for and pay over money which he should receive. They were not bound as he was for bad debts. Therefore the balances

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of former years might all have been made up of the price of goods properly sold on credit and which he had not been able to collect. If such was the character of the balances of former years the company could deal with the agent in respect of them in any manner they pleased, and the sureties were in no way concerned to know of their existence or how they were settled. It would, however, have been quite otherwise if these balances were composed, not of uncollected debts, but wholly or partly of money which Walker had received for goods sold, and instead of depositing it in the bank had used it for his own purposes. Such an act as that, if not within sections 308 or 310 of the Criminal Code, would nevertheless, in my opinion, be such an act of misconduct as would not only be a violation of his duty as an agent, but would be within the bond of the sureties, and would be very material to be known to them when asked to renew their obligation in the following year. It would be a transaction distinctly within *Railton* v. *Mathews*, 10 Cl. & F. 934; *Hamilton* v. *Watson*, 12 Cl. & F. 109; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, and *Adjala* v. *McIlroy*, 9 O. R. 580. Their agent would be a person unworthy of confidence, and if that was known to the plaintiffs it was their duty to make it known to the proposed sureties. The question, therefore, is whether there is any evidence that those balances, or any part of them, consisted of money of the company actually received and misapplied by Walker, and whether that was known to the plaintiffs before the bond now sued upon was taken. If there is evidence that the money was received it must be taken to have been misapplied, for it is clear he was called upon for it and it was not forthcoming. Now, with great deference to my learned brother, I think there is clear evidence that the balances of the previous year were, to the knowledge of the plaintiffs, composed, at all events in great part, of money actually received by Walker and not deposited by him as his duty required. The evidence of Mr. Woolverton, the president and manager of the company, is as follows:

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"At the end of each of the years 1891, 1892, and 1893, you were aware that there was a balance due from Mr. Robert Walker? Yes.

In respect of money received by him for you and not paid over? Yes.

And in 1893 it is said there was a balance of something over a thousand dollars? I do not remember the amount. I know there was a balance."

There is also correspondence between the company and Walker, with reference to the balance of the first year's business, which corroborates the evidence of the manager. There is a letter written by him to Walker of the 21st of May, 1892. That letter shewed that the balance was one that was within the bond, and for which he considered the bondsmen liable, and also that it was of such a nature that the sureties ought to be made aware of it before renewing their engagement.

Now, unless the balance was for money actually received by the agent, it was no concern of the sureties at all. The agreement with Walker shews how minute and particular the information was which he was to supply in the accounts which he was bound to render every week. It is not shewn that these accounts were not rendered, or that they did not contain the information which they ought to contain, and I think we must assume that they were rendered and were in proper form, and that the company knew that the balances were composed of money which had actually been received.

There is also a letter of the 1st of March, 1894, relating to the business of the year 1893. That was a month after the agent's employment had come to an end, and at a time when the business should all have been settled. In that letter the secretary communicates a resolution passed by the plaintiffs' board that unless he had his account with the company settled in twenty days the sureties would be notified. As we have seen, the balance at that time owing by Walker was $1,039.51 on the business of 1893, and a note of $277 for a

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balance of former years. It is not unimportant either, to note that the plaintiffs' counsel elicits from Walker the statement that about $50 of the deficiency of 1894 would represent accounts which were not collected, and that the sums uncollected during the whole period were no more than $300 or $400. As against all this there is a statement by Mr. Woolverton, in answer to the company's counsel, that Walker represented to them that he had outstanding accounts that would meet the deficiencies if he had time to collect them, and that he supposed that the amount which was behind was in outstanding accounts. Walker also admits that he may have made some such representation, but not that outstanding accounts would cover the whole balances. I find it impossible to believe, having regard to the whole evidence, and particularly to the unqualified statement made by Mr. Woolverton in his examination in chief, and to the letters written by him and Mr. Nelles, that the company's officers thought for one moment that their agent's deficiencies in the former years were represented by outstanding debts. On the contrary, I believe they knew perfectly well it was otherwise, and that if the sureties knew the truth they would refuse to renew their bonds. I think the plaintiffs cannot be heard to say that they were ignorant of any of the details of the sales made by the agent, and the money collected and uncollected by him in the former years.

This bond was for two things. It was for the fidelity of the agent, and also that he would account for and pay over money received for the plaintiffs. Fidelity required that he should keep a book and make entries therein of certain particulars as specified in paragraph 2 of the contract as above set forth. It also required that he should give and render to the company the accounts and statements and at the times specified in paragraphs 6 and 7. It also required him at the expiration of the term of his employment to return to the company all the books used by him in the company's business. All that was within the bond of the sureties, as well as the duty to pay over all money which he

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received, and in the event of any neglect or violation of any of these duties the company could forthwith discharge him and discontinue the engagement. Now, if Walker kept the books and made the entries therein, and if he rendered the accounts which his duty required, the plaintiffs must have had full information and could not be deceived by any statement made by him that there were uncollected accounts; and if he did not keep the books and make the entries and render the accounts he was an unfaithful agent to their knowledge. So also if at the end of each term he failed to deliver up to them the books used by him in the business, so that they might be informed of all the details of the business, that also would be a breach of duty on his part, which concerned the sureties, and for which they would be liable. The plaintiffs are therefore in this dilemma, either they received from the agent all the books, accounts, and information to which they were entitled, or their agent was during those former years an unfaithful agent, for whose fidelity for another term they could not honestly ask the sureties to renew their obligation without full diclosure of his past delinquencies. By their silence they allowed the bondsmen to believe, contrary to the fact, that he had been faithful in the past and might therefore be trusted in the future. That being so, I think the sureties are entitled to be discharged, and that the action ought to have been dismissed.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

Appeal allowed.

SPROULE v. WATSON.

Evidence—Will—Letters Probate—Testamentary Capacity.

Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only *primâ facie* evidence as far as real estate is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity.

Judgment of the Common Pleas Division affirmed.

Statement. THIS was an appeal by the plaintiff from the judgment of the Common Pleas Division.

The action was brought to recover the amount of a legacy charged by the will of one Henry Watson upon land devised by the same will to one of the defendants. The defendants contended that the land did not belong to the testator, but to the defendant William; and in the alternative pleaded that Henry Watson had not, when he executed the alleged will, testamentary capacity, and that the alleged will had been procured by the fraud and undue influence of one of the beneficiaries named therein.

Henry Watson died on the 26th of September, 1893, and letters probate of the will in question were issued without any contest by the proper Surrogate Court on the 1st of February, 1894. Proper notice, pursuant to the Evidence Act, R. S. O. ch. 62, was given by the plaintiff of her intention to use the letters probate in evidence at the trial, and no notice of objection was given by the defendants.

The action was tried before ROBERTSON, J., who refused to allow the defendants to give any evidence upon the issue of testamentary capacity; but a new trial on this point was ordered by the Divisional Court.

The plaintiff appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 18th of May, 1896.

W. M. Douglas, and *Frank Ford*, for the appellant. It is clear law respecting personalty, and it is submitted with

confidence equally clear now with reference to realty, or what but for the Devolution of Estates Act would be realty, that the grant of probate is conclusive evidence of the testamentary capacity of the testator as well as of the due execution and validity of the will. There can be no difference in this respect between realty or personalty because the Devolution of Estates Act expressly determines that upon the death of the owner of property, notwithstanding any testamentary disposition, it shall devolve upon and become vested in his legal personal representatives; it can be sold by them for the payment of debts, and can be administered by them in the same way as personalty. There is in fact and in law now no longer any distinction. The reason that the grant of probate has been always held to be conclusive as to personalty is that to impeach the will would be to shew something directly contrary to a matter determined by another Court of competent and exclusive jurisdiction: Williams' Law of Executors, 9th ed., pp. 464, 1795; 1 Jarman on Wills, 4th ed., p. 27; *In re Ivory, Hankin* v. *Turner*, 10 Ch. D. 372; *McPherson* v. *Irvine*, 26 O. R. 438. Besides in this case notice had been given, under section 41 of R. S. O. ch. 62, of intention to use the letters probate in evidence, and no notice of objection was given. The English cases, such as *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612; and *Ystalyfera Iron Co.* v. *Neath, etc., R. W. Co.*, L. R. 17 Eq. 142, must be read with reference to the provisions of section 62 of the English Statute, 20 & 21 Vict. ch. 77, and there is no similar enactment in this Province. Argument.

Watson, Q. C., and *J. M. Rogers*, for the respondents. By section 33 of the Judicature Act, R. S. O. ch. 44, it is provided that the High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate and whether letters probate of the will have been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise in the same manner and to the same extent as the Court has jurisdiction to try the vali-

Argument. dity of deeds and other instruments, so that the jurisdiction of the Court is expressly affirmed by statute and the issue as to the validity of the will was plainly brought before the Court, and the ruling excluding the evidence attacking the validity of the will on the ground of incapacity and undue influence was erroneous. The Evidence Act merely provides that in certain cases therein named the letters probate shall be sufficient evidence of the will and its validity and contents, but that provision was not intended to, and does not, shut out evidence to shew the contrary. The action having been brought with regard to the title to land, the letters probate were not, apart from the provisions of the Evidence Act, any evidence at all to establish a devise or other testamentary disposition, and apart from the Act it would have been necessary to produce the will, prove its execution and validity. Under the statute, the letters probate are at most *primâ facie* evidence upon these points: Williams' Law of Executors, 9th ed., p. 481; Greenleaf on Evidence, 15th ed., p. 659.

W. M. Douglas, in reply.

June 30th, 1896. HAGARTY, C. J. O.:—

The plaintiff seeks to enforce a charge created in her favour under her father's will against the defendants, one of whom is the devisee of the land charged.

In support of her claim she produces letters probate of the will granted to one Rosetta Carr, an executrix. She rests her title on that. The will was in Court.

The defendants offered evidence to impeach the will on the ground of incapacity.

The trial Judge refused to admit evidence for that purpose, considering the probate conclusive until called in.

I think the Divisional Court rightly held that the evidence should have been admitted.

The grant of probate is to a person not before the Court; no party to the action.

The claim arises on the will, not on the probate. The

testator's death, the probate and the bringing of this action were all within the year.

Judgment.

HAGARTY, C.J.O.

Under our statute all this realty was vested in the executors, and the probate would apparently shew that the party in whom the estate was vested was a stranger to the suit.

I am unable to understand how a decree for payment of the charge, or a valid sale in default, or a title could be shewn with the probate before the Court, and the executors not parties.

Therefore, it seems to me that the defendants could insist on their right to impeach the only title shewn, viz., the charge in favour of the plaintiff. They were ready to impeach the will which was in Court for that purpose.

I do not see how the judgment at the trial can stand, and the appeal against the Divisional Court judgment must be dismissed.

Apart from the question of impeaching the will I hardly understand how judgment could properly be entered for the plaintiff.

The probate was produced by her, shewing where the legal right was, and as already noticed, the decree for sale could hardly be properly made or carried out in the absence of the executors.

BURTON, J. A. :—

The action having been brought in reference to lands the probate was not, apart from the provisions of the Evidence Act, any evidence at all to establish a devise, and it was necessary to produce the will itself and prove its execution and validity. Looking at the risk of wills being lost, and at the expense of officials attending to produce them, the Legislature, following in that respect a similar enactment in England, enacted that upon giving notice to the opposite parties a certain time before trial of the intention to use the probate in evidence as proof of the devise, such probate shall be sufficient evidence of such will and

Judgment.

BURTON, J.A.

of its validity and contents, unless the party receiving the notice within four days after its receipt gives notice that he disputes the validity of the devise.

Under the English Act, under another section, if the will has been proved in solemn form the probate is made conclusive evidence except as against the heir or other person interested in the land, unless it was shewn that he had been cited.

Our Act contains no such provision, but in case of wills executed out of Ontario and within some other portion of Her Majesty's possessions the probate is to be sufficient *primâ facie* evidence only.

It has been held under the English Act under a provision similar to our own that after notice to the opposite party without a counter notice the production of the probate will be *primâ facie* evidence of the validity of the will and the competence of the testator, but that there was nothing to lead to the conclusion that the opposite party is not to be admitted to shew that the testator was incapable, and the will invalid. As the Court in one case remarks: "To hold that, the omission to give the counter notice of the intention to dispute the validity of the will would have the effect of establishing the will even if made by a lunatic in an asylum."

It is true a most pointed distinction is there drawn between the two cases of probate in common form and probate after proof in solemn form, and in our own Act, as I have pointed out, there is a distinction between the use of the probate of wills made in Ontario and wills made abroad; in the one case it is said that it shall be sufficient evidence, and in the other "sufficient *primâ facie* evidence," but I think they must be held to mean the same thing. If the counter notice had been given the will itself would have had to have been proved, and the probate could not have been used. By neglecting to give the counter notice the party subjects himself to the inconvenience of meeting the *primâ facie* case established against him by the production of the probate. It has been held that an

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BURTON, J.A.

enactment altering the law as to evidence, and creating statutory evidence, whereby the rights of parties may be defeated, must be construed strictly, and I think, therefore, that we give full effect to the Act when we hold that the probate is only *primâ facie* evidence.

But it is said that the Evidence Act has no application, and that since the passing of the Devolution of Estates Act there is no difference between realty and personalty, and that as was always the case as regards personalty the grant of probate is conclusive evidence of the testamentary capacity of the testator, as well as of the due execution of the will.

This raises a very serious, and to my mind, a much more difficult question; and although I should hesitate a long time before interfering with the conclusion arrived at in the Divisional Court in holding that the Act does not apply, I must confess to a feeling of very great doubt upon the subject. It is true that for some purposes land is treated as personal property, and if not otherwise disposed of is to be distributed as personal property, and that it devolves upon and becomes vested in the personal representatives for a limited time, and for a special purpose only, and that at the expiration of the time mentioned in the statute the land vests as realty in the devisees without any conveyance by the executors, still it is treated in the same way as personalty in the Probate and Surrogate Acts; but without coming to any positive conclusion upon that point, I think the High Court had jurisdiction to try the validity of this will, notwithstanding the granting of probate, and that it was open to this defendant, who is in possession claiming title if the will be held invalid, to raise this defence, and that the validity or invalidity may be enquired into, and the new trial was, therefore, properly granted.

OSLER, J. A.:—

I agree in dismissing the appeal.

Judgment.

MACLENNAN, J.A.

MACLENNAN, J. A.:—

This is an action to recover a legacy of $400 charged on a parcel of land. The will devises the land to the defendant Frederick Watson, and charges the legacy upon it; but having regard to the terms of the bequest, it is a general and not a specific legacy. The plaintiff and her sister Rosetta Carr were appointed executrices, but the plaintiff did not prove, and probate was granted to Rosetta Carr. The action is against Frederick Watson, who is a nephew of the plaintiff, and against William Watson, who is the father of Frederick. The statement of claim, after stating that the testator owned the land in question, sets out the devise to Frederick, subject to the plaintiff's legacy, and then alleges that after the testator's death Frederick accepted the devise and took possession of the land. What is said of the defendant William Watson is merely that he claims some interest in the land. The defendant Frederick denies that he took or is in possession of the land, or that he accepted the devise, or that he is answerable for the legacy, and he alleges that his father, the defendant William, was before the death of the testator and still is in possession and claims to be owner. The defendant William denies the alleged title of the testator, and sets up title in himself under the Statute of Limitations and otherwise. He also disputes the will, and says that at the time when it was made his father was not possessed of testamentary capacity, and that if he was, the will was procured to be made by the undue influence of his daughter Rebecca Carr.

After a lengthy trial, the learned Judge found that the testator and not the defendant William was the owner of the land at the time of the testator's death, and he gave judgment for the plaintiff for payment of her legacy and costs, and in default directed a sale of the land. The judgment was entered ordering Frederick personally to pay the legacy and costs. This was wrong; nor, looking

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MACLENNAN, J.A.

at the reasons for judgment, do I think the learned Judge intended so to order. The endorsement on the record is, perhaps, not very clear on the point, and probably occasioned the mistake.

In the course of the trial the defendant William proposed to call evidence of incapacity of the testator, and of undue influence in procuring the will, but the learned Judge refused to receive the evidence, holding that the defendant could not go behind the probate. On appeal to the Divisional Court the judgment was affirmed on the main question of the testator's title. The personal order against Frederick was held to be improper, and was rescinded, and a new trial was directed to try the issues of incapacity and undue influence. The order of the Divisional Court as drawn up dismisses the action as against the defendant Frederick with costs, although that is not what was directed. The present appeal is from that order. The judgment on the question of the testator's title is acquiesced in, and is no farther contested; and the argument before us was confined to the right of William to go into evidence attacking the validity of the will.

As it stands before us, then, the case is this: A general legacy to plaintiff; a devise to the defendant Frederick, subject to the legacy as a charge; testator's title to the land at the time of his death established; the defendant William, testator's son, in possession at the time of the death and up to the present time; will dated 12th December, 1888; testator's death 26th September, 1893; probate granted 1st February, 1894, to Rosetta Carr; action commenced 18th October, 1894.

The executrix, the testator's personal representative, has not been made a party to the action. By the Devolution of Estates Act the title was in the personal representative for twelve months, and may be in her still for anything that appears to the contrary.

No objection to the action on that ground has been raised by the defendants or either of them up to the pre-

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MACLENNAN, J.A.

sent time, and the Court ought not now to give effect to it if it can be avoided. To enable the plaintiff to get on without the testator's personal representative, it was necessary to allege that there were no debts, or that they were paid, and that the title had vested in the defendant Frederick. There are no such allegations, and for anything that appears the title may still be in the executrix, and the land may be required to be sold by her for the payment of debts. If the debts are still unpaid, the only judgment which can be granted on this record is an order making the executrix a defendant, and directing the administration of the estate. The defendant Frederick does not admit that he has accepted the devise, but he has not disclaimed. If he should disclaim, then the estate, subject to the debts and legacies, would devolve upon all the testator's children in equal shares, and they ought all to be parties. If he accepts the devise, as he may still do, notwithstanding what he has said in his defence, and if the debts are all paid, and if the cautions, if any, have expired, then subject to the question of the validity of the will, a judgment for raising the legacies by sale might be pronounced without the presence of other parties.

The question of William's right to go behind the probate must now be considered. The ground of his contention was section 33 of the Judicature Act, R. S. O. ch. 44, which declares that the High Court shall have jurisdiction to try the validity of last wills and testaments whether the same respect real or personal estate and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. The origin of this enactment was in the Act 12 Vict. ch. 64, sec. 10, which was in the same terms, except that in the revise of 1877, the words, "whether probate of the will has been granted or not," were introduced for the first time. Until the Judicature Act of 1881 the enactment was confined to the Court of

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MACLENNAN, J.A.

Chancery, and it was by that Act extended to the High Court. Without that enactment the Court of Chancery would have had no jurisdiction, as was decided in *Allen* v. *McPherson*, 1 H. L. C. 191, and *Meluish* v. *Milton*, 3 Ch. D. 27, the only jurisdiction as to wills of personalty being in the Probate Court, and as to wills of real estate in the Courts of law.

In *Perrin* v. *Perrin*, 19 Gr. 259, and *Wilson* v. *Wilson*, 24 Gr. 377, which were both before the amendment of 1877, jurisdiction was entertained notwithstanding probate had been granted, and the statute affirmed the correctness of those decisions. Before the Devolution of Estates Act probate had no effect upon wills of land, except that under certain circumstances it might be used as *primâ facie* evidence of the will. But the validity of a devise did not depend in any way upon probate. So also on application for letters of administration or probate, it was not necessary to cite the heirs or devisees, nor were they in any way bound by the grant. The original will alone was what bound them, and if it was invalid the probate did not make it valid against them. It was different as regards personal estate, and the next of kin. In the case of a will of personalty, in which an executor was appointed, when probate was applied for by the executor it was not necessary in the absence of a caveat to cite any one; and whenever either probate or administration was applied for by one of the next of kin, it was only necessary to cite those having a prior right. In all these cases any other person interested could only secure an opportunity of contesting probate or administration by entering a caveat. Under the old law, therefore, probate of wills of both real and personal estate might be granted behind the backs and without the knowledge of persons having the greatest interest in the estate, and the change effected by the law as it now stands was greatly needed. Since the Probate Act of 1868 the validity of a will might be contested in the Probate Court, with the right of appeal, and no doubt whenever so contested the result would be binding on the

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MACLENNAN, J.A.

parties to the contest. But it would not be binding on persons interested who were not parties. In the present case, it does not appear whether William, or any person, was cited on the application for probate; and having regard to the statute, it cannot stand in the way of any one not cited or not appearing, who desires to contest its validity in the High Court.

If the defendant William were a stranger to the testator and his estate, as at present advised I think the probate would be conclusive evidence of the will as against him, the title of the testator having been proved. It is proved that the land belonged to the testator, and does not belong to him. A Court of competent jurisdiction has affirmed the validity of the will by granting probate, and he, as a stranger to the testator and his estate, has no interest to impeach it. I think he is in the same position as a person sued on a promissory note, or in trover for chattels belonging to the testator's estate, who, if not otherwise interested in the estate, could certainly not set up, or be allowed to go behind the probate to prove the invalidity of the will. I think the Devolution of Estates Act has now put real estate on the same footing as personal estate so far as probate is concerned; and that although the present question concerns land, the probate is as good evidence of title to the land as it would formerly have been of title to personal estate.

But then, in the present case, William was not a stranger to the testator or his estate. He is a son of the testator, and entitled to a distributive share of his estate in case of intestacy. He is in possession, and if the will is invalid he is entitled to remain in possession undisturbed, as a tenant in common with the other heirs. He is made a party defendant to this action, in order that upon a sale to pay the plaintiff's legacy he may be ordered to give up possession to the purchaser. The action is, therefore, an action to recover the land from him; and I think the statute which he invokes authorizes and enables him to defend himself by shewing, if he can, that the will is in-

valid. It is true that he does not in terms set up this defence, or claim title as one of the heirs-at-law of the testator; but the facts are all stated, namely, that he is one of testator's sons and that he is in possession, and he adds that the will is invalid. I think, therefore, his defence is sufficiently pleaded, and that the judgment is right in deciding that he ought to have been allowed to attack the will.

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MACLENNAN, J. A.

Upon the whole, therefore, if it is admitted that the debts are paid, the case may go back for trial as it is. If Frederick disclaims, the other heirs must be made parties; if he does not disclaim, they need not. The order of the Divisional Court should be discharged, so far as it dismisses the action against Frederick, and should merely discharge the personal order.

Appeal dismissed.

McGuiness v. Dafoe.

Justice of the Peace—Felony—Issue of Warrant—Absence of Written Information—Notice of Action—Criminal Code, ss. 22, 23.

A justice of the peace, who issues his warrant for the arrest of a person charged with felony without the information having been sworn, is liable in trespass.

Sections 22 and 23 of the Criminal Code are a codification of the Common Law, and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant.

A notice of action alleging that the defendant on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested, and kept under arrest on a charge of arson, and on said 8th of September, maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him and to be committed for trial, and to be confined in the common gaol, is a sufficient notice of action in trespass, BURTON, J.A., expressing no opinion on this point.

Per curiam. *Semble*, Notice of action was necessary. *Sinden* v. *Brown*, 17 A. R. 173, approved and followed.

Per BURTON, J.A.—Notice of action is not necessary in such a case.

Judgment of the Queen's Bench Division, 27 O. R. 117, affirmed.

Statement. THIS was an appeal by the defendant from the judgment of the Queen's Bench Division, reported 27 O. R. 117.

The defendant was a justice of the peace, and the plaintiff, who was arrested on a charge of arson on a warrant issued by the defendant without a sworn information, brought the action to recover damages for trespass and malicious prosecution.

The facts are stated in the report below and the notice of action in question is there printed *in extenso*.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 10th of February, 1896.

W. Nesbitt, and *H. E. Rose*, for the appellant.

J. A. Macintosh, for the respondent.

Subsequently the Court intimated that further argument would be heard on the question whether notice of action

was necessary, and this question was argued on the 14th of May, 1896. Argument.

W. R. Riddell, for the appellant.

Clute, Q. C., for the respondent.

June 30th, 1896. BURTON, J. A.:—

Whether the case of *Sinden* v. *Brown*, 17 A. R. 173, was or was not properly decided it is binding upon me as well as every other member of the Court so long as it remains unreversed by some higher tribunal, but it does not, in my opinion, govern this case.

Here the magistrate was aware of the necessity of a sworn information to justify the issue of a warrant, and he was aware that there was no sworn information in this case; he could not, therefore, believe that he had any jurisdiction to order the arrest; if there had been any question as to the facts the opinion of the jury must necessarily have been taken, but the facts are undisputed. In the confusion the magistrate unfortunately omitted to have the information sworn to, but he was aware of the necessity for it, and was also aware, as he admits, that it was not done; he is not, therefore, entitled, in my opinion, to the protection of the statute, having acted wholly without jurisdiction, and being aware that he was so acting.

Something was said about his invoking the aid of the information in the other case, but the warrant was not issued upon that information, and such belief would not, in my opinion, have assisted him, as the facts would not, if proved, have afforded any justification. The information in that case was against a different person, his name was not mentioned in it, and the warrant would still be without any sworn information to support it.

As I am of opinion that no notice was necessary, and my learned brothers hold that that given was sufficient, there must be a new trial as ordered by the Divisional Court, but I agree with my learned brothers that it should be confined to the trespass count.

Judgment.

OSLER, J.A.

OSLER, J. A. :—

In this case the defendant by some oversight appears to have issued his warrant without the information, which had been laid before him charging the plaintiff with the offence, having been actually sworn.

By the provisions of the Code, sections 558, 559, 563, a justice has jurisdiction to issue a warrant only upon a complaint or information in writing being laid before him. Here there was no such complaint or information, and the arrest having been made by the constable under the authority of the defendant's warrant directed to him, the defendant having acted without jurisdiction in issuing it is liable in trespass. But, being sued in trespass for the arrest thus made, he says, granted that I had no jurisdiction to issue the warrant yet I am justified, if you say it was my trespass, by the 22nd section of the Code, because I was a peace officer [sec. 3, (*s*)] who, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without warrant had been committed, whether it had been committed or not, and who on reasonable grounds believed that the plaintiff had committed the offence, and the constable or other peace officer who actually made the arrest was acting for or in aid of me, or at my request in doing so. This contention was pressed upon us with much force by Mr. Riddell, who argued that *Ashley's Case*, 12 Rep. 90, cited and relied upon in the Court below, was not law, referring to numerous cases in the year books and the observations of various writers upon the authority of the volume in which *Ashley's Case* is reported. I am of opinion, however, that the argument cannot prevail.

Section 23 of the Code being read with section 22, it seems plain that what both point at is the personal or individual act of the peace officer. Section 22 justifies the officer—justice or constable—in personally arresting a suspected person under certain circumstances without warrant; that is to say, just as if he had a warrant in his

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OSLER, J.A.

possession authorizing him to do it; and section 23 justifies every one who is called upon to assist the peace officer in making the arrest, if he knows that he is a peace officer, and does not know that there are no reasonable grounds for the suspicion which justifies the latter in acting.

These sections, are merely a codification of the common law. "If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And he may also by word command any person to apprehend him, and such a command is a good warrant without writing. But if the same be done in his absence then he must issue his warrant in writing": 5 Burn's Justice of the Peace, 30th ed., p. 1114.

"Justices of the peace have a double power as in relation to the arrest of felons; one, upon complaint of another person, * * ; another, primitive and original in themselves," * * [Code, sec. 3, (*s*)].

"If a justice of peace see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And so he may by word command any person to apprehend him. And such command is a good warrant without writing, but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in writing under his seal to apprehend the malefactor. * * And note, that if the justice of peace hath either from himself or by a credible information from others knowledge of a felony done and just cause of suspicion of any person, he may himself arrest and commit that person": 2 Hale's Pleas of the Crown, pp. 86, 87.

"And as long as he fills that character he appears to enjoy the same latitude as a constable of arresting a person on reasonable suspicion of having committed a felony, without being called upon to prove that a felony has been actually committed": 1 Burn's Justice of the Peace, 30th ed., p. 293.

Ashley's Case, 12 Rep. 90 at p. 92, referred to in the Court below, seems to be the case of an arrest by a private person upon suspicion, and is thus commented upon in 2 Hale's

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OSLER, J.A.

Pleas of the Crown, p. 80: "It is true, that he that is not an officer cannot justify by the command of him who suspects, if he be also no officer: 12 Rep. 92, (If he is an officer and the felony is committed in his presence he may do so, *supra*.). But then the case is easily solved, for if a felony be committed, and A. hath probable cause to suspect B. and accordingly suspects B. and acquaints C. with the whole matter, C. upon this, having probable cause to suspect B. though he cannot justify the imprisonment of B. as by the command of A. that first suspected him, he may justify by his own suspicion; and the like of him that comes in aid of A. to arrest B."

"An officer of justice, may, in assistance of him that suspects, justify the imprisonment; as a constable upon complaint made to him by him that suspects, may justify. And in like manner a justice of the peace, upon being applied to by him that suspects, and (is) acquainted with the whole circumstances of the case." 2 Hale's Pleas of the Crown, p. 79.

Coke in his Institute, p. 177, had laid it down that "a justice of the peace can not make a warrant to take a man for felony unless he be indicted thereof....For the justice himself cannot arrest one for felony, unless he himself suspect him, (as any other may) and by the same reason he cannot make a warrant to another." This was strongly controverted by Hale, who shews the law to be that a justice, upon oath made by A. of a felony committed, and that A. suspects B. and shews his cause, may issue a warrant to bring B. before him for further examination, 2 Pleas of the Crown, p. 79. Hawkins, Pleas of the Crown, vol. 2, p. 134, is less positive, saying that "it seems probable that the practice of justices of peace in relation to this matter also is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person upon strong grounds of suspicion for a felony, or other misdemeanour, before any indictment hath been found against him."

In *Butt* v. *Conant*, 4 Moo. 195; 1 Bro. & B. 548; Gow 84,

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OSLER, J.A.

it was so determined, upon a learned review of the authorities; and then followed Jervis's Act and our own statute, and finally the Code, providing that the warrant must be issued upon complaint or information in writing upon oath.

If, therefore, the justice is not himself personally arresting the offender on view or upon suspicion, or calling in some one to assist him in doing so, he can only act by issuing a warrant to apprehend the offender in the manner authorized by law. It is the former case to which sections 22 and 23 are applicable, the actual personal interference of the justice and those whom he calls to his assistance in making the arrest. There is no authority for saying that as peace officer he has any authority to send B. as a constable to arrest anywhere in his county a person whom he suspects of having committed an offence for which he may be arrested without warrant. B. may as constable or private person be in a position to justify the arrest by reason of his own suspicion. He cannot, in such a case justify under A.'s (the justice's) command, and if he cannot justify by reason of his own suspicion, both A. and B. are wrongdoers, for A. cannot justify under section 22. If the constable can justify the arrest as upon his own suspicion it may perhaps be said that it was his arrest alone and not that of A. the defendant upon his command. But that is not this case, for the constable was acting under the defendant's warrant alone. He was not professing to assist the defendant in making a personal arrest upon suspicion. The warrant, and not any suspicion of his own as to the commission of the crime, was his justification. Nor was the defendant professing to arrest in the only manner and under the circumstances which entitle him to invoke the protection of section 22. He was simply directing an arrest to be made in the only way in which, under the circumstances, he could direct it, viz., by warrant. That warrant turns out to be illegal, and he cannot now turn round and assert that the arrest was (as in fact it was not) ministerial only.

Judgment.

OSLER, J.A.

Section 559 supports the view I have expressed, which, in consequence of the argument so earnestly addressed to us by Mr. Riddell, I have explained at greater length than was perhaps necessary. Upon receiving any complaint or information the justice shall consider it, and if he thinks a case made out shall issue a summons or warrant, "and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant." That is to say, he is not to say to the complainant: "The law permits you to arrest without warrant—without any authority. Exercise your own authority and do not ask me for a warrant."

I agree, therefore, with the Court below that the defendant cannot merely on the ground of his own reasonable suspicion justify the commanding of the constable by warrant to make the arrest. The execution of the warrant, it having been in fact issued without any information in writing, upon oath, lays the defendant open to an action of trespass: *Appleton* v. *Lepper*, 20 C. P. 138; *Friel* v. *Ferguson*, 15 C. P. 584; *Regina* v. *Hughes*, 4 Q. B. D. 614.

A question then arises as to the notice of action. The defendant contends that the notice served is defective. The plaintiff relies upon it as sufficient, and in the alternative sets up that no notice was necessary.

The statement of claim sets forth two causes of action: one for the malicious prosecution of the plaintiff on a charge of arson; the other in trespass for assault and false imprisonment. At the trial the plaintiff was nonsuited, the learned Judge holding as to the former, that absence of reasonable and probable cause for the prosecution had not been shewn, and as to the latter, that the notice of action was defective, as it was substantially only a notice of action for malicious prosecution, and not for the trespass and false imprisonment. The judgment was set aside as to the trespass, the Divisional Court being of opinion that the notice sufficiently set forth a cause of action for that.

Judgment.

OSLER, J.A.

I am not prepared to differ from the Divisional Court on this point, as it appears to me that the notice cannot fairly be distinguished from that which we held to be sufficient in *Bond* v. *Conmee*, 16 A. R. 398, affirmed in the Supreme Court. It is a notice of action for a wrongful and illegal arrest. It may also include a notice for a cause of action under the 1st section of the Justices Protection Act for malicious prosecution, but that can be no reason for regarding it as defective for the purpose of an action under the other section of the Act if the language is wide enough to embrace an action of trespass. *Brandt* v. *Craddock*, 27 L. J. Ex. Ch. 314; 3 H. & N. 958, Am. Ed.

The case of *Taylor* v. *Nesfield*, 3 E. & B. 724, is distinguishable. There the plaintiff was entitled to recover, if at all, in an action under the 1st section, but the notice of action contained nothing to shew that he intended to charge the defendant under that section. It was simply a notice of action for trespass and nothing more.

As we hold the notice to be sufficient, it is perhaps hardly necessary to determine whether, under the circumstances, notice was necessary. I certainly do not wish to intimate any opinion that it was not. The evidence shews that the defendant issued the warrant either in momentary forgetfulness of the fact that the information had not been actually sworn, or under some confused impression that another information which was before him was sufficient to cover the charge against the plaintiff and another person who was implicated in the alleged offence, and there is no evidence impeaching his good faith. The principle on which we decided *Sinden* v. *Brown*, 17 A. R. 173, fully supports the defendant's right to notice of action.

With reference to that case, which as regards the question of notice of action has been said or suggested not to be consistent with certain English authorities, I wish to add that I see no reason to recede from the opinion there expressed, that the defendant was entitled to notice. Doubtless he was a trespasser as he had no authority to issue the warrant upon the conviction under the circum-

Judgment.

OSLER, J.A.

stances, but in issuing it he was doing an act, the nature and description of which was such as his general character of justice of the peace authorized him to do; that is to say, issuing a warrant of arrest upon an unsatisfied conviction, which upon its face purported to be enforceable in that manner, and which the defendant in good faith believed he had the right so to enforce. The cases of *Bross* v. *Huber*, 18 U. C. R. 282, 286; *Cook* v. *Leonard*, 6 B. & C. 351, judgment of Bayley, J.; *Jones* v. *Gooday*, 9 M. & W. 736; *Weller* v. *Toke*, 9 East 364; *Bird* v. *Gunston*, 4 Dougl. 275; *Parton* v. *Williams*, 3 B. & Ald. 336, 337; *Prestidge* v. *Woodman*, 1 B. & C. 12; *Smith* v. *Hopper*, 9 Q. B. 1005; *Selmes* v. *Judge*, L. R. 6 Q. B. 724, and many other cases which might be referred to, amply support our judgment in that case as to the necessity for notice of action.

There is a class of cases where actions have been brought against persons, who, acting in supposed pursuance of an Act of Parliament, *e.g.*, the Larceny Act, have arrested others as having been "found committing" an offence against the Act, and the question has arisen whether they were "found committing" the offence, or were "immediately" apprehended within the meaning of the Act so as to justify the arrest. The right of the defendant in such cases to notice of action has been said to depend upon whether he *bonâ fide* believed in the existence of a state of facts which, had they existed, would have afforded a defence to the action, and it is laid down that this is the proper question in such cases to submit to the jury. Such are the cases of *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Hermann* v. *Seneschal*, 13 C. B. N. S. 392; *Roberts* v. *Orchard*, 2 H. & C. 769; *Chamberlain* v. *King*, L. R. 6 C. P. 474; *Griffith* v. *Taylor*, 2 C. P. D. 194.

But I do not concede that this formula can be in terms applied generally as a test in actions against magistrates under the second section of the Justices Protection Act. That is to say, it is not necessarily the test of whether the act can be said to have been so far done in execution of their office as to entitle them to notice. The test will

Judgment.

OSLER, J.A.

be found not to fit many cases cited above in which notice was held to be necessary. These cases shew, as Blackburn, J., points out in *Selmes* v. *Judge*, L. R. 6 Q. B. 724, that it is not universally true that it is only where a justice has acted wrongly through a mistake of fact that he is entitled to notice. See also *Booth* v. *Clive*, 10 C. B. 827, at pp. 834, 835.

There is another class of cases, of which *Agnew* v. *Jobson*, 13 Cox C. C. 625, is an illustration, where a justice has done some act "wholly alien to his jurisdiction," for doing which he had "no other authority than any other person in the realm, no pretence for authority or for saying that he was within the precincts of the law": *Norton* v. *Miller*, 2 Chitty 140. In such cases there is little difficulty in holding that the defendant is not entitled to notice of action. But neither *Sinden* v. *Brown*, 17 A. R. 173, nor the case at bar, is within either of the classes I have referred to.

Upon the general question and as bearing upon the question whether a person in the position the defendant occupied in this case is entitled to notice, I may refer to *Friel* v. *Ferguson*, 15 C. P. 584, in which, however, the facts were peculiar and the conduct of the magistrate seems not to have been *bonâ fide*: *Caudle* v. *Seymour*, 1 Q. B. 889, where notice was given; *Leary* v. *Patrick*, 15 Q. B. 266; *Cave* v. *Mountain*, 1 M. & G. 257, 262; *Neil* v. *McMillan*, 25 U. C. R. 485; *Usill* v. *Hales*, 3 C. P. D. 319, at p. 323; *Cummins* v. *Moore*, 37 U. C. R. 130; *Venning* v. *Steadman*, 9 S. C. R. 206, at p. 218; Paley on Summary Convictions, 7th ed., p. 406.

For these reasons I am of opinion that the appeal should be dismissed, but, as in drawing up the order of the Court below a new trial has been ordered upon the whole record, it will be proper to vary it by confining the new trial to the action of trespass. There is no reason for disturbing the judgment of the trial Judge as to the claim for malicious prosecution, nor is there anything in the judgment of the Divisional Court which indicates that they had any intention of doing so. On the new trial it will

Judgment.

OSLER, J.A.

doubtless be considered how far it is open to the plaintiff to complain of anything which took place after he was actually brought before the magistrate, which seems to have been within a few hours after his arrest; for however illegal may have been his arrest under the warrant, and detention up to that time, the jurisdiction of the defendant attached when the plaintiff was before him charged with the offence, and his subsequent detention and commitment would be justifiable: *Regina* v. *Hughes*, 4 Q. B. D. 614; *In re Maltby*, 7 Q. B. D. 18, at p. 28; *Dixon* v. *Wells*, 25 Q. B. D. 249.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred with OSLER, J. A.

Appeal dismissed.

CAVANAGH V. PARK.

Master and Servant—Workmen's Compensation for Injuries Act—Notice of Action—Notice of Objection Thereto—Pleading—55 Vict. ch. 30, sec. 14 (O.).

The provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it.

Judgment of BOYD, C., affirmed.

Statement.

THIS was an appeal by the defendant from the judgment of BOYD, C.

The plaintiff was a workman employed by the defendant and brought the action under the Workmen's Compensation for Injuries Act, to recover damages for an injury sustained by him while working at a boiler-plate roller in the defendant's factory.

The action was tried at Chatham, on the 13th of March, 1896, before BOYD, C., and a jury, when a verdict was given in the plaintiff's favour for $250.

The defendant appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 9th of October, 1896, the only contention of general interest being that pleading want of notice of action or insufficiency of notice of action is a compliance with the provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.).

H. D. Gamble, and *H. L. Dunn*, for the appellant.

Pegley, Q. C., for the respondent.

November 10th, 1896. The judgment of the Court was delivered by

OSLER, J. A.:—

[The learned Judge stated the facts and dealt with the case on the merits, and continued:]

Judgment.

OSLER, J.A.

On the appeal, it was objected that the action was not maintainable on the ground that no notice of action had been given as required by the 9th and 13th sections of the Act. The notice actually given was proved at the trial, but no objection to it was taken there, though it did not comply with the requirements of the Act in several respects, and though want of notice of action was pleaded. It appears, however, to me, that the defendant cannot rely upon this objection, because he has not complied with the 14th section of the Act, which enacts that if the defendant in any such action as the present intends to rely for a defence on the want of notice, or the insufficiency of notice, he shall, not less than seven days before the hearing of the action, give notice to the plaintiff of his intention to do so. We cannot hold that this stringent provision is satisfied by merely pleading the want of notice, or treating it, as Mr. Gamble forcibly argued, as applicable to an action in the Division Court only. It is, in my opinion, in terms imperatively applied to all actions. The evident intention of the Legislature is that the action shall not turn upon the question of notice, or no notice, unless justice towards the defendant absolutely requires it, for the section goes on to enact that the Court may in its discretion, and upon such terms and conditions as may be just in that behalf, order and allow an adjournment of the case for the purpose of enabling the notice to be given, and, subject to any such terms and conditions, any notice given pursuant to and in compliance with the order in that behalf, shall, as to any such action and for all purposes thereof, be held to be a notice given pursuant to and in conformity with sections 9 and 13 of the Act.

When no notice has been given as required by this section, I think the defendant cannot be heard to complain that he has not had notice of the injury as provided by the 9th and 13th sections. *A fortiori* where he has not done so at the trial, which is the stage at which the Judge is to exercise his discretion as to adjournment, giving a new notice, and so forth.

Judgment.

It is satisfactory to know that the defects in the notice actually given cannot in the least have prejudiced the defence.

OSLER, J.A.

I only refer to *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300, to say that the sections as to notice are different from what they were when that case was decided.

Appeal dismissed.

GUROFSKI V. HARRIS.

Assignments and Preferences—"Creditor"—Fraudulent Conveyance—Action for Tort.

Statement.

THIS was an appeal by the plaintiff from the judgment of a Divisional Court, [BOYD, C., and ROBERTSON and MACMAHON, JJ.] reported 27 O. R. 201, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 23rd and 24th of September, 1896.

F. E. Titus, and *S. H. Bradford*, for the appellant.

Watson, Q.C., for the respondent.

November 10th, 1896. The appeal was dismissed with costs, the Court agreeing with the judgment appealed from.

Fleming v. Edwards.

Fraudulent Conveyance—Voluntary Conveyance—Grantor's Intention to Embark in Business.

A voluntary conveyance of part of his estate by a retired and successful hotel-keeper to his wife, made at a time when he was in solvent circumstances but was, after some months of idleness, about to take up the hotel-keeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss by fire.

Judgment of the Divisional Court reversed.

Statement. This was an appeal by the defendants from the judgment of the Divisional Court.

The plaintiff was the assignee for the benefit of creditors of the defendant Thomas Edwards, and brought the action to have a conveyance of a farm from Edwards to his wife declared fraudulent and void.

The action was tried on the 19th of November, 1895, at Lindsay, before Meredith, J., who at the close of the case delivered the following judgment:—

Meredith, J.:—

I hold that the plaintiff cannot succeed in this action. In order that the plaintiff should succeed here, it must be found, as a matter of fact, that the intent on the part of the grantor at least was to delay, hinder, or defeat creditors. And that is naturally a question of fact; and in endeavouring to reach the very truth of the matter, I do not rely very much upon the testimony of either of the defendants, as to what their intention at the time was. I prefer the evidence of the undisputed facts and the surrounding circumstances of the case. The transaction was, in my opinion, substantially a voluntary conveyance by the husband to the wife. It was made at a time when he was perfectly solvent and had practically no debts. He was not entering for the first time into the hotel business; he had been for many years in the business of an innkeeper; he had discontinued that business for over six months and he was about taking it up again; it was not in their minds,

Judgment.

MEREDITH, J.

in the mind of either of the parties to the transaction, that it was a hazardous business; on the contrary it was in their minds, as it had in fact been, a most profitable business, a business out of which this farm in question, which cost some five thousand two hundred and odd dollars, had been purchased and paid for. There is nothing to indicate any idea on the part of either husband or wife that in taking up that business again the husband was incurring any great risks; there seems to have been no reason why they should not think it would continue to be a profitable business; but as the wife says, her great objection to the business was that it entailed on her a great amount of hard work; that she had been working hard for many years to accumulate a little property, for which hard work she had got nothing but her mere subsistence. Under all these circumstances, am I to reach the conclusion that the intention of either party was to defeat creditors? I think not. I am unable to come to that conclusion. The wife has simply acted here in a natural way; she has set forth in her evidence what any one might say under the circumstances; she took the property in some sense so that it might not be lost by her husband; that may well be so, and yet no intent may have existed to defraud any one. The wife might very well say, you are in a position to give me this, I prefer it to be under my control, in my hands, not subject to any chance either of your sickness, or death, or of your creditors reaching it. I prefer it to be my own, subject to my debts. I do not think that in her testimony she meant any more than that which any wife would say was her intention in taking the conveyance from her husband. No one was misled by this transaction; the conveyance was registered; the husband was not in possession and in no sense was he held out to be the owner of the property. I am therefore obliged to dismiss this action; but, exercising that discretion over costs which I have, partly for reasons which during the trial I may have given some clue to, I exercise that discretion in dismissing the action without costs.

Statement. The plaintiff appealed to the Divisional Court and the appeal was argued before ARMOUR, C.J., and FALCONBRIDGE, and STREET, JJ., on the 23rd of January, 1896, and on the 26th of March, 1896, the appeal was allowed, the judgment of the Court being delivered as follows by

ARMOUR, C. J.:—

The male defendant had carried on the business of a tavern-keeper for several years in the village of Woodville, in a tavern, the furniture in which he owned, and while carrying on such business, and in the month of January, 1883, he purchased the land mentioned in the impeached conveyance for the sum of $5,270.

Some time in 1890 he sold out the furniture in the tavern to one Henderson for some $800 or $900, as he said, and at that time the land had been fully paid for and was free of incumbrance.

In the beginning of May, 1891, he purchased from Henderson the tavern and furniture for the sum of $2,800, paying him $1,600, and taking the tavern subject to a mortgage of $1,200 to one Sinclair.

$1,000 of this sum of $1,600 he raised by mortgaging the land mentioned in the impeached conveyance to one Stabook for that sum; $200 or $300 of this sum of $1,600 he paid by returning to Henderson a note for that amount, which Henderson had given him for part of the purchase money of the furniture when Henderson bought it from him, and the balance, $300 or $400, he paid in money which he said he had on hand.

The conveyance of the tavern, subject to the mortgage to Sinclair of $1,000, was made by Henderson to the male defendant on the 4th of May, 1891.

On the 28th of April, 1891, the male defendant made the mortgage to Stabook for $1,000, and on the 1st of May, 1891, he made the impeached conveyance to the female defendant, his wife, in pursuance of the Act respecting Short Forms of Conveyances and for the expressed consideration of $100.

Judgment.

ARMOUR, C.J.

The only mention of the Stabook mortgage in this conveyance was in the covenant against incumbrances, which was qualified by these words, "save and except a mortgage of one thousand dollars to Miss Esther Ellen Stabook."

On the 12th of June, 1891, the male defendant borrowed $100 at 7 per cent. from one Carmichael, for which he gave his note at one year and which was unpaid at the date of the assignment hereinafter mentioned.

The male defendant entered upon the business of tavern-keeper after his purchase from Henderson, and continued to carry it on until the 7th of February, 1895, when the tavern was destroyed by fire.

And on the 15th of April, 1895, he made an assignment for the benefit of his creditors, and the plaintiff became the assignee, and at that time his liabilities were $2,300 and his assets a little over $200.

The tavern was insured and he received $1,765, of which Sinclair, the mortgagee, got $640, but he gave no satisfactory evidence of what became of the balance, but no part came to the assignee's hands.

The learned Judge found that the impeached conveyance was substantially a voluntary conveyance, and he upheld it as not being fraudulent and void within the Statute of Elizabeth.

This case is, in my opinion, brought by the evidence within that class of cases in which it has been held that a man who contemplates going into business cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations.

I do not think that it was satisfactorily proved that the $100, the consideration expressed in the impeached conveyance, was ever paid, or if paid, that it was the money of the female defendant. She said in her examination for discovery that she got it from her father's estate, but she could not tell how much she got from her father's estate; and that she got it over fourteen years before the trial, and at the trial she gave a different account of the time when

Judgment.

ARMOUR, C.J.

she received it, and comparing her evidence on her examination for discovery with her evidence at the trial, it is obvious that her statements were not to be relied on, and the learned Judge expressed that opinion both as to her statements and as to the statements of the male defendant.

But even if it were satisfactorily proved that the $100 was paid and that it was the money of the female defendant, it was a grossly inadequate consideration, and as such was a badge of fraud, and coupled with the avowed object of the female defendant in procuring the impeached conveyance, brought such conveyance within the statute.

She was asked on her examination for discovery :— "Then why did you select that particular time to get the deed of that property? Well, he might invest and perhaps lose what he had invested, like lots does make a poor investment. You wanted the deed at this particular time because he was going into business, that is what caused you to think of asking for the deed then? I suppose so. I want you to tell me again if the statement you made before was incorrect about your getting this farm at that time because your husband was going into business. That is why I wanted it; if my husband was going into any business."

From this evidence the inference is irresistible that the impeached conveyance was made with the view of the male defendant becoming indebted at a future time, and it was, therefore, fraudulent and void within the statute.

I refer to *Buckland* v. *Rose*, 7 Gr. 440; *Campbell* v. *Chapman*, 26 Gr. 240; *Ferguson* v. *Kenny*, 16 A. R. 276; *Stileman* v. *Ashdown*, 2 Atk. 477; *Mackay* v. *Douglas*, L. R. 14 Eq. 106.

The judgment must therefore be for the plaintiff setting aside the impeached conveyance with costs.

The defendants appealed and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 21st and 22nd of September, 1896.

Robinson, Q.C., and *C. J. Holman*, for the appellants. There was an entire absence of any intention to commit a fraud, and in *Real Estate Loan Co.* v. *Yorkville Road Co.*, 9 O. R. at p. 470, it is pointed out that it is elementary law that a conveyance by a person not indebted and not intending a fraud is good as against subsequent creditors. The utmost extent to which the law has gone in invalidating a conveyance of property made by a grantor, who intends to enter into business, is where the business is a hazardous one, and that was the case in *Mackay* v. *Douglas*, L. R. 14 Eq. 106, which is considered in *Ex parte Russell*, 19 Ch. D., at p. 594, the principle being said to be that a man is not entitled to go into a hazardous business and immediately before doing so settle all his property voluntarily, the object being this—if I succeed in business, I make a fortune for myself; if I fail, I leave my creditors unpaid. The Divisional Court was wrong in testing the validity of this conveyance by the fact that Edwards became insolvent on the 15th of April, 1895, because this insolvency did not occur in the ordinary course of business, but was owing to the loss by fire: *Clarkson* v. *Sterling*, 14 O. R. 460; *Ex parte Mercer*, 17 Q. B. D. 290; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158. Up to the time of the fire Edwards was solvent; and if the fire had not happened, he could have paid his creditors in full and have had a considerable margin. The conveyance in question was made four years before the insolvency, was immediately registered, and all persons had notice thereby that the farm belonged to the wife. The case of *Buckland* v. *Rose*, 7 Gr. 440, if good law, is very different from the one under consideration. The learned Judge, in giving judgment in that case, relies on the statement in *French* v. *French*, 2 D. M. & G. 95, that "where a settlement leaves insufficient to satisfy debts, it is void." And in *Buckland* v. *Rose*, it is pointed out that there was a withdrawal of all the available assets so as to leave nothing tangible for the satisfaction of the debt, and that the avowed object was to protect property from the debts of the partnership. *Ferguson* v. *Kenny*, 16 A. R. Argument.

Argument. 276, was a case where the husband was clearly insolvent at the time of the conveyance. *Collard* v. *Bennett*, 28 Gr. 556, was a much stronger case against the impeached conveyance, but the Court upheld it. See also *Crombie* v. *Young*, 26 O. R. 194; *Spirett* v. *Willows*, 3 De G. J. & S. 293; *Holmes* v. *Penney*, 3 K. & J. 90.

F. J. Travers, and *J. A. Mills*, for the respondent. The voluntary conveyance was made at the time that the defendant Thomas Edwards was going into business; therefore the burden of justifying the conveyance is cast upon the parties endeavouring to sustain it; and where a man about to enter into business and contract debts denudes himself of the bulk of his property by a voluntary conveyance, and subsequently becomes insolvent, the inference of a fraudulent intent is irresistible: *Ferguson* v. *Kenny*, 16 A. R. 276. The evidence of the defendants in this action, upon which the conveyance herein is sought to be sustained, was of an untrustworthy character, and should not be given effect to, and the judgment appealed against rightly held the plaintiff entitled to succeed in his attack on the conveyance: *Buckland* v. *Rose*, 7 Gr. 446; *Campbell* v. *Chapman*, 26 Gr. 240; *Ferguson* v. *Kenny*, 16 A. R. 276; *Stileman* v. *Ashdown*, 2 Atk. 477; *Mackay* v. *Douglas*, L. R. 14 Eq. 106. The fact of the defendant being solvent at the time the conveyance was made is not an answer, the question being not "Was he solvent?" but "Did he contemplate becoming insolvent?": *Stileman* v. *Ashdown*, 2 Atk. at p. 480. If the fraudulent intent exists in the mind of the grantor alone, that will be sufficient to invalidate the conveyance: *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Oliver* v. *McLaughlin*, 24 O. R. 41.

Robinson, Q.C., in reply.

November 10th, 1896. HAGARTY, C.J.O.:—

I feel great difficulty in agreeing with the judgment that the conveyance there declared fraudulent comes fairly

Judgment.

HAGARTY, C.J.O.

either within the letter or spirit of the statute. If it be held so to do I think it will be a step in advance of all the decisions heretofore declaratory of the law on the subject.

I think the opinion expressed by the learned trial Judge was very fairly warranted by the evidence.

When the impeached deed was made the defendant was perfectly solvent and was so after the withdrawal of this property from his general assets. His business had been very successful and after six or seven months' idleness he resolves to buy back the place and resume business. There would be no pretence for calling it a hazardous or speculative business, or one of an unfamiliar kind into which he was entering or resuming.

I acquit him fully of all fraudulent intent as to future or prospective creditors. I think the learned Judge has rightly construed the loose and somewhat confused statements of the wife as to her notions or forebodings. Her husband was certainly not contemplating a fraud. His subsequent insolvency was not the result of his trading, but from the unforeseen calamity of the destruction of his property by accidental fire and in no way referable to his incurring or creating any new set of debts or creditors.

If no interval of cessation from business had occurred, we might find a trader finding all his liabilities paid or settled and a large surplus on hand. He determines in good faith to settle some of his property on his wife or children, leaving ample for existing engagements after the withdrawal of the settled property. He has no idea of defrauding any one, present or future. He continues several years in prosperous business and solvent. An accidental fire destroys a large portion of his assets, and practically ruins him and renders him insolvent.

I am not prepared to say that his voluntary conveyance must necessarily be held a fraud upon the statute. Many cases, besides those relied on in the judgment appealed from, have been examined by us. No case, as it seems to me, has gone the length of the present, if held to be good in law.

Judgment.

HAGARTY, C.J.O.

It may not be necessary to press beyond their legitimate meaning Lord Westbury's words in *Spirett* v. *Willows*, 3 DeG. J. & S. 293, that if subsequent creditors attack a voluntary deed it is necessary to shew that the settlor made the settlement with express intent to delay, hinder or defraud, or that the settlement left him without sufficient means to pay his then existing debts. Each case, as has been often said, must stand on its own facts and the necessary intent may be assumed from the circumstances, as in such cases as *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 594; which cases fully explain the law on this subject as to future business.

In *Buckland* v. *Rose*, 7 Gr. 446, the settlor declared in evidence that he made the settlement to guard against possible after losses. The nature of the business, its being speculative or hazardous, or of a nature with which the settlor was unfamiliar, or in which he was inexperienced, are all fully considered.

Where the settlement reserves an interest or a future estate to the settlor it cannot generally stand: see the old case of *Stileman* v. *Ashdown*, 2 Atk. 477, before Lord Hardwicke.

See also *Ware* v. *Gardner*, L. R. 7 Eq. 317; and *Ex parte Mercer*, 17 Q. B. D. 290; which is very strong as to the question of intent. I refer also to *Crossley* v. *Elworthy*, L. R. 12 Eq. 158, as containing some valuable references to authorities.

I may also notice *Hagerman* v. *Buchanan*, 14 Am. St. Rep. 732, 45 L. J. Eq. 292, where there is a long summary of American authorities upon the question of voluntary settlements made just before embarking in a hazardous business.

On the whole, I think that the appeal must be allowed and the judgment of the trial Judge restored.

BURTON, J. A.:—

This case differs from many of those which have been referred to in this important respect, that the debtor, at the

Judgment.

BURTON, J.A.

time when he complied with his wife's request to make a settlement upon her, was perfectly solvent and but for the accident of the fire would apparently have continued solvent.

The settlement must, I think, be regarded as a voluntary settlement.

The principle of *Mackay* v. *Douglas*, L. R. 14 Eq. 106, and that class of cases, appears to me to be this, that when a man is going into business, I will not say a hazardous business, and immediately before doing so settles the bulk of his property voluntarily and becomes unable to pay his debts within a short time afterwards, it will be presumed that his object was to place his property out of the reach of his future creditors, and, if such a settlement be made, it seems in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed.

In one case, *Townsend* v. *Westacott*, 2 Beav. 340; 4 Beav. 58, the insolvency took place three years afterwards, but it was shewn there that the settlor was largely indebted at the time of the settlement.

In commenting upon that case, Vice-Chancellor Malins makes this remark (*Crossley* v. *Elworthy*, L. R. 12 Eq., at p. 167): "Upon that case it is clear that, though the mere fact of a man being indebted is not fatal to a settlement, it is not necessary to prove actual insolvency, but if insolvency takes place shortly after the execution of the settlement that is enough;" but he adds: "There may be an exception to this rule, * * and if in this case it had been proved there had been some unexpected loss, or something which could not have been reasonably reckoned upon when the settlement was executed, that would have brought (the settlor) within the exception."

In the present case the debtor, though at the very time that he executed the settlement he contemplated going into business, yet it was not a business with which he was unacquainted, but he was merely resuming a business which he had carried on successfully for many years and he owed

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BURTON, J.A.

no debts. He retained a large portion of the property and but for the loss by the fire was apparently able to pay every one in full. The learned Judge at the trial found it to be an honest transaction and I cannot join, therefore, in reversing his decision.

For these reasons I think the appeal should be allowed.

OSLER, and MACLENNAN, JJ.A., concurred.

Appeal allowed.

FROWDE v. PARRISH.

Copyright—Compilation—Infringement.

Statement.

THIS was an appeal by the defendants from the judgment of BOYD, C, reported 27 O. R. 526, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 24th and 25th of November, 1896.

T. W. Howard, for the appellants.
Maclaren, Q.C., for the respondent.

At the conclusion of the argument the Court dismissed the appeal with costs, agreeing with the judgment below.

JOHNSTON V. DOMINION GRANGE MUTUAL FIRE INSURANCE COMPANY.

Insurance—Fire Insurance—Change Material to the Risk.

A provision in a policy of fire insurance permitting the insured to use "for the purpose of threshing the crops on the premises a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain.

The use of a steam engine on one occasion in connection with a machine for crushing grain is not a change material to the risk within the meaning of the statutory condition. That condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on.

Judgment of ROBERTSON, J., affirmed.

Statement.

THIS was an appeal by the defendants from the judgment of ROBERTSON, J.

The action was brought upon a policy of insurance issued by the defendants to recover $1,600, the loss sustained by the plaintiff by reason of the burning of his buildings and their contents. The policy in question contained a special provision (number 17) allowing the plaintiff "to use and allow to be used for the purpose of threshing the crops on the premises mentioned in this policy, a steam thresher with an efficient spark arrester, subject to the provisions that proper care be observed in the use thereof, and of only threshers being used which have efficient spark arresters in good working order, with water continuously kept therein;" and it contained the statutory condition (number 3) requiring notice of any change material to the risk. In one of the variations in conditions (number 10) it was stated that "the creation of any encumbrance by way of mortgage, life lease, judgment, or other lien, as also any alteration in the mode of occupation, or the erection of new buildings endangering the property," should be held to be a "change material to the risk."

The fire was caused by sparks from a steam engine used for only one day to work a machine for crushing grain. No permission to use the steam engine was asked for, and no notice of the intention to use it was given. The engine was placed close to the plaintiff's barn and straw stacks.

Statement. The action came on for trial at Walkerton, on the 10th of October, 1895, before ROBERTSON, J., and a jury. No evidence was offered in support of the defences of misrepresentation, etc., pleaded, but the defendants obtained leave to amend and set up the defence that there had been a breach of the third statutory condition and the seventeenth added condition, and the action was then tried. The jury found that there had been no change material to the risk; that the plaintiff was using a steam engine for purposes other than threshing his crops, and that the engine had not a spark arrester with water kept therein; and on these answers judgment was entered in the plaintiff's favour.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 10th of September, 1896.

Aylesworth, Q. C., for the appellants. Apart from any special conditions, the plaintiff cannot recover, for he has been guilty of gross negligence, and is really just in the same position as if he had set the buildings on fire. At any rate there is a direct breach of the provisions of the policy. The spark arrester was not in proper condition, and there was a change material to the risk in that the engine was brought upon the premises. The clause applies not only to structural change in the insured property, but also to change of circumstances and surroundings: *Sovereign Fire Ins. Co.* v. *Moir*, 14 S. C. R. 612. The insured was making the barn *pro tempore* a grinding place instead of a storing place.

Shepley, Q. C., for the respondent. The third statutory condition does not apply at all. There was no change within the meaning of that clause, particularly as explained by the tenth added condition. It refers to a change in the condition of the insured property, either structural or for the purpose for which it is used: *Reid* v. *Gore District Mutual Fire Ins. Co.*, 11 U. C. R. 345;

and even if there was a change it was not material: *Ottawa Forwarding Co.* v. *Liverpool, etc., Ins. Co.*, 28 U. C. R. 518; *Todd* v. *Liverpool, etc., Ins. Co.*, 18 C. P. 192; *Peck* v. *Phœnix Mutual Ins. Co.*, 45 U. C. R. 620; *Date* v. *Gore District Mutual Fire Ins. Co.*, 15 C. P. 175. The jury have decided the question of materiality, and their decision is final: 55 Vict. ch. 39, sec. 33, sub-sec. 3 (O.). The policy contemplates the use of a steam engine for certain purposes, and the use for another less dangerous purpose, can reasonably be found not to be a change within the policy. Nor does the seventeenth added clause apply. It applies only to threshing and cannot be read as introducing by implication a condition against the use of a machine for crushing. Argument.

Aylesworth, Q. C., in reply.

November 10th, 1896. HAGARTY, C. J. O.:—

I do not think it necessary to discuss the question arising on the seventeenth of the added conditions.

The company had thereby agreed to allow the use of a steam thresher with certain appliances for the purpose of threshing crops.

As shewn in the evidence and found by the jury, the plaintiff was not using the engine for any such purpose.

He had brought it there only on one occasion and only for one day, and it was used wholly for the purpose of chopping and crushing grain and cattle feed. No excuse for such user can arise on this seventeenth condition, as no permission was given therefor.

I, therefore, think the whole case must rest on the defence that a change material to the risk within the control or knowledge of the plaintiff must be promptly notified in writing to the underwriters.

I hardly see how it was necessary for the plaintiff in effecting the insurance, to foresee that he might have possibly to bring in a steam engine for crushing purposes. He had been in the habit of getting his crushing done by

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HAGARTY, C.J.O.

engines elsewhere, and only on this one occasion two or three years after his risk began, he decided to bring the engine near his own barn.

It therefore remains to consider whether his policy is avoided by his omitting to notify the defendants or to obtain their permission, if his using the steam engine for crushing—even for the few hours of the one occasion—was a change material to the risk.

This was a question of evidence, and had to be submitted to the jury. The latter found that such change was not so material.

The plaintiff insists that there was no structural change or alteration in the condition of the insured property; that what is complained of, was a mere exposing to extra risk of fire for a few hours; that it might be likened to the burning of a brush heap or bundle of shavings, etc., too near the barn, from which a spark flew, causing the damage.

It seems to resolve itself into a question—wholly apart from variation seventeen—whether the plaintiff loses his right to recover in consequence of his own act, either of carelessness or negligence, in the management or use of the means employed for crushing purposes, and exposing his property to unnecessary risk by his conduct, and so as to materially increase the defendants' risk on their policy.

I do not think it a case in which we are called on to set aside the finding of the jury in the plaintiff's favour. No misdirection is complained of. It was wholly a jury question, and the defendants cannot complain of the manner in which it was left to the jury.

OSLER, J. A.:—

There is nothing in the policy or the statutory conditions which expressly forbids the use of a steam thresher for ordinary purposes, any more than the burning of brush or logs in the ordinary course of clearing or farm management is forbidden. Any implied restriction can be found

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OSLER, J.A.

only in the third condition, which provides that any change material to the risk and within the control or knowledge of the insured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent. But among the additional conditions is found one (No. 17) on which the defendants now rely, though the defence under it was not pleaded nor raised at the trial until the last moment. This added condition, if it may properly be called a condition, is, that the insured is permitted to use, and allow to be used, for the purpose of threshing the crops on the premises mentioned in the policy, a steam thresher with an efficient spark arrester in good working order, with water continuously kept therein. The other part of the condition need not be set forth, and the defendants plead that after the issuing of the policy, the plaintiff used on his property, and adjoining and close to his buildings, a steam engine, which was not provided with a sufficient spark arrester in good working order with water continuously kept therein; and that such engine was so used by the plaintiff for other purposes than threshing his crops.

I think the defendants have neither pleaded nor proved a defence under this condition. What the plaintiff is proved to have used, was a steam grain crusher and chopper, not a steam thresher; in other words, a steam engine in connection with a grain crusher.

The use of such an instrument or an engine for such a purpose is not forbidden or restricted by the policy or condition seventeen, which is pointed entirely to the use of a steam thresher and the engine in connection therewith. The danger from the one is not necessarily as great as that arising from the other, and we cannot enlarge the words of the condition or extend them to a case which the defendants have not provided for, and which, though sufficiently astute to oppose the plaintiff's claim on other grounds, they evidently at first did not think within the condition.

Another defence added at the trial, was one which the defendants raise under the third statutory condition

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already mentioned, viz., that the use of the steam crusher was a change within the meaning of the condition material to the risk, made without the defendants' consent, and therefore avoided the policy.

The allegation in the defence is, that the plaintiff was in the habit of using the crusher. The evidence is, that it was used only on the day on which the fire occurred, and was the machine of a neighbour hired or lent to, or operated for, the plaintiff on that single occasion. The jury have found that no change material to the risk took place after the policy was issued, and perhaps that is all we need concern ourselves with. But as the defendants contend that the fire was in fact caused by the engine, (though there is no finding on that ground), and that it was, therefore, impossible that the jury could rightly find that no material change had occurred, it may be well to enquire whether the use of such an implement on a single occasion, dangerous though it may have been, can be said to have been a material change within the meaning of the condition. It may be that the erection and maintenance of a permanent steam threshing engine or steam crusher, involving necessarily the use of fire in the immediate neighbourhood of the buildings insured, would constitute such a change within the meaning of the policy. That might be said to be such a change in condition of the insured premises as to make them materially different from that in which they were represented to be when the policy was applied for—in short, constituting an entirely different risk, though even then it would, in strictness, still be a question for the jury.

What this condition, in my opinion, points at, however, is something permanent and habitual—some structural change in the premises, or alteration in the nature of the work or business carried on there, and not a mere casual and temporary act. A case very much in the plaintiff's favour is *Shaw* v. *Robberds*, 6 A. & E. 74, where by the conditions of insurance the policy was to be forfeited unless the buildings were accurately described and the trades car-

ried on therein specified; and if any alteration were made in the building or the risk of fire increased, the alteration, etc., was to be notified to the insurers, and allowed by endorsement on the policy, otherwise the insurance to be void.

The plaintiff carried on no trade on the premises except that of drying corn in a corn kiln, but on one occasion he allowed the owner of some bark which had been wetted, to dry it, gratuitously, in the kiln, and this caused a fire by which the premises were destroyed on the third day after the drying of the bark had commenced. Drying bark was a distinct trade from drying corn and more hazardous; and the insurers charged a higher premium for bark kilns than corn kilns. It was held, nevertheless, that the assured was not precluded from recovering, either on the ground of an alteration of the risk, or (in the absence of fraud) because the fire arose from his negligence.

Something was said on the argument as to the negligence of the assured. It seems hardly necessary to advert to this, even if, which I doubt, there was any negligence in fact.

In the absence of an express condition, negligence is one of the risks ordinarily insured against, as the case just cited shews. Indeed, the point has been too long firmly settled to be now debated. See the well-known case of *Dixon* v. *Sadler*, 5 M. & W. 405, and in error, 8 M. & W. 895; *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73, and *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561, where the plaintiffs attempted to make the insured and his wife liable for the felonious act of the latter in setting fire to the insured premises whereby the insurers sustained damage. The experiment, as might have been expected, was unsuccessful. I quote the case for the observation of the Judge, as to the liability of the insurer upon an ordinary policy: 'Under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself or some one acting with his privity and consent."

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OSLER, J.A.

For the reasons above given, I think the facts proved do not bring the case within the third statutory condition, and there being no other condition expressly prohibiting what was done, the plaintiff is entitled to succeed. The appeal must be dismissed with costs.

MACLENNAN, J. A.:—

I am of opinion that the judgment should be affirmed.

There is no question that the fire was accidental. It arose from a spark, proceeding from a steam engine which was being used for chopping grain in the neighbourhood of the plaintiff's barn, being carried by the wind and lodging in some hay or straw stored in the barn. Although it may have been an imprudent or even negligent act of the plaintiff to use the steam engine in the neighbourhood of the barn without greater precautions than were taken, such an accidental fire is still within the contract of insurance, unless guarded against by sufficient conditions. In the latest (fourth) edition of Bunyon on Fire Insurance, at p. 141, the law is stated to be settled that short of wilful negligence on his part which might amount to an overt act of felony, the assured is entitled to indemnity for his loss arising therefrom, that being one of the principal risks to guard against, which is the object of the insurance. It matters not whether the fire which causes the loss be lighted improperly or after being properly lighted be negligently attended; in either case the insurers will be liable, and he cites *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; *Dixon* v. *Sadler*, 5 M. & W. 405, and other cases. In *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561, at p. 568, Williams, J., states the law thus: "Under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself or some one acting with his privity and consent. In order to escape from such a loss as the present, the company ought to introduce into their policy an express excep-

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tion." See also *Shaw* v. *Robberds*, 6 A. & E. 74, and Wood on Fire Insurance, pp. 274-278. Unless, therefore, the use of the engine is forbidden in some way by the conditions of the present policy its use is no defence. The defendants set up a condition which permits the plaintiff "to use and allow to be used for the purpose of threshing the crops, * * a steam thresher with an efficient spark arrester, subject to the provisions that proper care be observed in the use thereof, and of only threshers being used which have efficient spark arresters in good working order, with water continuously kept therein." There is no condition forbidding the use of a steam engine for other purposes; and although the engine which was used in the present case was one which was ordinarily used for threshing crops, I think it is impossible to extend this condition so as to make it applicable when used for crushing or chopping, and not for threshing. I think to do so would be materially to alter the contract between the parties, which the Court cannot do. The fire hazard in threshing, and in other uses of a steam engine, may be, and I should say obviously must be, very different; and I am persuaded the condition was framed for the protection of the company in cases of threshing alone.

The jury found that the plaintiff did not keep water continuously in the spark arrester; but inasmuch as I think the case was not within the condition, that finding is immaterial.

It was also pleaded and contended that the use of the steam engine was within the statutory condition against any change material to the risk without notice. I do not think the use of the engine was within the condition, which intends some change of a permanent, or at all events durable, character, and not the bringing of a steam engine on the premises for use during part of a day: *Shaw* v. *Robberds*, 6 A. & E. 74, at pp. 82, 83. The provision as to giving notice could not be complied with in such a case. The jury, however, found that the use of the

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engine did not increase the risk, and that was left to them fairly by the learned Judge.

The appeal should, therefore, be dismissed.

BURTON, J. A.:—

I am of the same opinion.

Appeal dismissed.

MCCAUSLAND v. HILL.

Covenant — Restraint of Trade—Company — Abandonment of Corporate Powers—Covenant between Intending Shareholders—Right of Shareholders to Enforce after Incorporation—Practice—Injunction—Damages.

A mutual covenant with each other by persons engaged in the same trade throughout Canada, not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, is good.

Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant.

Breach of such a covenant may be restrained by injunction in an action by one or more of the other parties thereto though no actual damage is proved to have resulted from the breach.

An agreement by a company, incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, etc., etc., for the sale of its stock of plate glass to a company to be formed with a covenant not to compete in the plate glass business with that company for twenty years is valid and is not an *ultra vires* abandonment of its powers.

One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company, HAGARTY, C.J.O., dissenting on this point.

Judgment of MACMAHON, J., affirmed.

Statement.

THIS was an appeal by the defendant from the judgment of MACMAHON, J.

On the 12th of April, 1893, an agreement was entered into for the formation of a joint stock company to be

known as The Consolidated Plate Glass Company of Canada to take over the plate glass business of the parties to the agreement, who were the Cobban Manufacturing Company (Limited), of the first part, William Richard Hobbs and Thomas Saunders Hobbs of the city of London in the Province of Ontario, merchants, trading under the name, style or firm of Hobbs Manufacturing Company, of the second part, William Ferguson and Edwin Hill, both of the city of Toronto, in the Province of Ontario, merchants, trading under the name, style or firm of The Toronto Plate Glass Importing Company of the third part, and Joseph McCausland and Robert McCausland, both of the city of Toronto aforesaid, merchants, trading under the name, style and firm of Joseph McCausland & Son, of the fourth part. Statement.

The company was formed, and after its formation this action was brought by all the parties to the agreement except Ferguson and Hill, to restrain Hill from committing an alleged breach of one of the covenants.

The action was tried at Toronto in the autumn of 1895, before MacMahon, J., who, on the 18th of December, 1895, gave the following judgment in favour of the plaintiffs:—

MacMahon, J.:—

Since the trial I have given much consideration to the numerous questions involved in this case.

The agreement of the 12th of April, 1893, between the plaintiffs and the defendant and his then partner William Ferguson fully sets out the objects intended to be effected by the several parties thereto, which, from the evidence and the agreement itself, may thus be stated: William Ferguson and the defendant Hill were trading on Victoria Street, Toronto, under the name and style of "The Toronto Plate Glass Importing Company"; included in which business was the dealing in clear plate glass and other kinds of

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glass. The plaintiffs, as part of their respective businesses, also dealt in clear plate glass. After consultation between the plaintiffs and Ferguson and Hill, it was found that the expenses connected with that part of their respective businesses was out of proportion to the profit derived, and that in fact there was little or no profit. With the design of reducing the expenses, it was agreed that that part of the business should be consolidated.

The agreement recites that "Whereas the several parties hereto have, as part of and in connection with their respective businesses, been dealing in clear plate glass, and believing that such branch of business can be more economically and advantageously carried on under one company, have agreed with the others and other of them as follows:

That a joint stock company shall be formed under The Companies' Act, ch. 119 R. S. C., for the purpose of acquiring from the parties hereto the stock-in-trade of clear plate glass, fixtures and plant, and certain assets pertaining thereto, owned by each, and the goodwill in connection therewith, and also for the purpose of importing, buying, selling, trading and dealing in plate glass, sheet glass, ornamental glass, and painters and glaziers' supplies of every kind.

That the said company shall be called 'The Consolidated Plate Glass Company, of Canada (Limited),' with a capital stock of $50,000, divided into 2,500 shares of $20 each."

The chief place of business of the company is by the agreement to be at the city of Toronto; and among the first directors are William Ferguson, and the defendant Edwin Hill; William Ferguson being named as second vice-president of the company.

The agreement provides that upon the company being incorporated each of the respective parties shall assign and transfer to the company their stock of clear plate glass, other than plate glass for silvering purposes, in their respective warehouses.

The agreement contains also the following provisions:—

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"The fixtures, plant and goodwill of the several parties in connection with said clear plate glass business, in case the respective parties cannot agree as to the value thereof, are to be transferred to the company at a valuation or appraisement to be made by William Charles Phillips, William Richard Hobbs and Edwin Hill."

"The several parties hereto assign to the said company all orders, excepting import orders, which they may respectively have for supplies of clear plate glass (other than glass for silvering purposes)—the company to make an allowance of five per cent. commission in respect of same."

"Upon the said company completing arrangements for taking over, in accordance with the terms of this agreement, the stock-in-trade, goodwill, and effects which the several parties hereto have respectively agreed to transfer to said company, none of the parties hereto shall, for a period of twenty years after the date of incorporation of said company, and whilst said company continues dealing in clear plate glass, carry on, individually or in partnership with any person or persons, or to be in any way directly or indirectly engaged, concerned, or interested in the business of buying, selling, or dealing in clear plate glass in the Dominion of Canada, and each and all the parties hereto undertake and agree upon completion of transfers to the company, to enter into such reasonable covenants with the company as the latter may require for the full protection of the company in respect to the matter in this clause referred to: Provided always that the restriction herein mentioned shall not apply to plate glass in good faith bought by any of the parties for silvering purposes, and so used and dealt with by them; nor to any clear plate glass bought by any of the parties from the said company for the purpose of bevelling, bending, ornamenting, or otherwise substantially improving and enhancing the value of the same, or for the purpose of using same in the manufacture of show-cases, or in the ornamentation of other articles in the manufacture of which plate glass is a mere adjunct, provided the glass thus bought from the

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company is so dealt with by the parties purchasing the same."

Then there is a further covenant by the parties of the third part, Ferguson and Hill, that after the incorporation of the company they shall cease using in connection with their business the name of "The Toronto Plate Glass Importing Company"; and shall not thereafter use in connection with said business, or in any business in which they, or either of them, may become interested, the said name, or any firm name or style in any way indicating a dealing or trading in plate glass generally.

The several covenants and agreements are made binding on the assigns and legal representatives of each of the parties thereto. The agreement is executed by the several parties thereto individually.

On the back of this agreement there is a covenant under seal by Francis John Phillips and William Charles Phillips, covenanting with the other parties to the agreement except the Cobban Manufacturing Company (the parties of the first part thereto), that they will be responsible for and on behalf of the Cobban Manufacturing Company for the due fulfilment by it of the terms and conditions entered into on its part under the agreement.

I find that the effect of the covenant preventing any of the parties from dealing in clear plate glass in any part of the Dominion for twenty years was fully explained to and fully understood by Ferguson and Hill before the execution of it, Mr. Ritchie, as counsel acting on behalf of all the parties, pointing out the far reaching effects and the importance to the parties of the covenant.

Ferguson and Hill had orders for clear plate glass from Halifax, Winnipeg and British Columbia, and the other parties had orders from other parts of the Dominion, including New Brunswick and Prince Edward Island.

The parties to the agreement signed the stock-book of The Consolidated Plate Glass Company for the respective number of shares provided for by the agreement. The first stock-list was signed by the Phillipses in trust, and by

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those who carried on the business as co-partners in the partnership names. That was afterwards, namely, on May 1st, 1893, and before the charter was granted, remedied by opening a new stock-book, in which the individual partners of the various partnerships signed for the respective portions of the stock, William Ferguson subscribing for 290 shares and the defendant Edwin Hill for 100 shares.

A charter was granted under the Dominion Act to the parties executing the agreement; the charter providing that The Consolidated Plate Glass Company of Canada is to have all the rights and powers given by the Act, and for the following purposes, namely:

"To acquire from the applicants so much of their stock-in-trade as consists of clear plate glass, and the fixtures, plant, assets and good-will of the applicants' business in connection therewith; and for importing, buying, selling, trading and dealing in all kinds of plate glass, sheet glass and ornamental glass and painters and glaziers' supplies of every description, the operations of the said company to be carried on throughout the Dominion of Canada."

After the charter was granted The Consolidated Plate Glass Company procured premises for carrying on its business, and the respective parties to the agreement transferred to it the whole of their clear plate glass; the stock of clear plate glass owned by Ferguson and Hill which was taken over by the consolidated company being valued at $13,102; and shares in the consolidated company in accordance with the agreement were issued to them for $26,000; one half of which represented the value of the stock of clear plate glass transferred to the consolidated company, the other half the goodwill of that part of the business. That was the course pursued in respect of each of the parties to the agreement.

Ferguson and Hill became insolvent, and made an assignment for the general benefit of their creditors to E. R. C. Clarkson on the 30th of September, 1893; the total assets as set forth in the schedule (including the paid-up stock in the Consolidated Plate Glass Company of $26,000) being

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$103,967.98; the inventory shewing that they had sheet glass and mirror plates to the value of $40,807 in stock at that time.

The stock was advertised for sale by the assignee, and the defendant endeavoured to procure a purchaser for it, and informed one Pearson of the business being for sale. Pearson eventually agreed to become the purchaser, on condition that the services of the defendant Hill could be secured to assist in the business, of which he (Pearson) was wholly ignorant. Pearson says that he would not have bought it had he been unable to secure Hill's services; and that had Hill not been an undischarged bankrupt he would have taken him into partnership. But as he was an undischarged bankrupt an agreement was arrived at between Pearson and Hill by which Hill's wife was to become Pearson's partner, which she did under an agreement dated the 6th of December, 1893, by which the business was to be carried on in the premises of The Toronto Plate Glass Importing Company, as "dealers in glass, and mirror manufacturers and bevellers." Under that agreement Mrs. Hill was to be entitled to two-fifths of the clear yearly profits, and Pearson to three-fifths. On the same day an agreement under seal was entered into between the firm of Pearson & Hill and the defendant Hill, whereby Hill contracted and agreed with the firm of Pearson & Hill to enter the firm's service, as dealers in glass, and mirror manufacturers and bevellers, for the term of three years; the agreement containing a provision that Hill should not be required "to be directly or indirectly engaged, concerned, or interested in the business of buying, selling, or dealing in clear plate glass, if the said parties of the first part (Pearson & Hill) shall carry on or do any business in clear plate glass."

Mrs. Hill put no capital into the business, nor did she take the slightest part in connection therewith. All the terms of the agreement were entered into between Pearson and her husband, and without Pearson having any direct communication with her. In fact, Hill was the person

creating the profits, which by the agreement were to be paid to his wife. Without him no purchase would have been made by Pearson, no profits created. He was virtually the partner, although his wife's name was used; she was not carrying on a business separate and apart from her husband.

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Pearson stated, and so I find, that at the time the partnership agreement was entered into he did not contemplate dealing in clear plate glass, and the business was carried on for some months without any clear plate glass being purchased or dealt in by his firm. The defendant Hill was an expert in cutting and dealing in plate glass; and when the firm of Pearson & Hill commenced to deal in clear plate glass he wrote letters on behalf of the firm and gave quotations to intending purchasers, and entered into some contracts for putting clear plate glass in shop windows. In the letters written by him for the firm, after the stamp of The Toronto Plate Glass Importing Company had been impressed at the foot thereof, he wrote his name, "Edwin Hill." A letter to Mr. Buchanan, of Galt, I think, shewed that he relied upon his name in connection with the old Toronto Plate Glass Importing Company as being of benefit to the new firm of Pearson & Hill, who still continued to use the name of The Toronto Plate Glass Importing Company, and according to Mr. Duncan's evidence, Hill went out and solicited orders and gave quotations for clear plate glass.

The firm of Pearson & Hill was dissolved on the 7th of May, 1894 (at the time the injunction was obtained), by the withdrawal of Hill's wife from the partnership. The business was sold out by Pearson to the firm of Hill & Rutherford, who carried on the business on the same premises on Victoria street, and in their cards they announced themselves as successors to The Toronto Plate Glass Importing Company. The firm of Hill & Rutherford was composed of Alice Hill, the defendant's wife, and W. F. Rutherford, who had been bookkeeper during the existence of the firm of Ferguson and Hill. The defendant Edwin Hill travelled

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for that firm, and also had the agency for a German looking glass plate company, of New York. In acting as traveller for Hill & Rutherford, he announced that he was agent for every kind of window and ornamental glass, clear plate glass excepted. He stated in his evidence that when inquiries were made in respect to clear plate glass while he was so travelling, he answered the inquiries by telling the inquirers that they must communicate with the firm in Toronto, their card stating that they are dealing in plate and window glass of every description.

Then as to this part of the case, I have to consider, first, whether the defendant in his capacity as salesman, and in fact as manager of the business of Pearson & Hill, has committed a breach of his covenant by "being directly or indirectly concerned or interested in the business of buying, selling or dealing in clear plate glass in the Dominion of Canada." And secondly, whether the covenant into which he entered was too wide, by reason of the restraint covering the whole of the Dominion of Canada, and therefore void.

In regard to the first point, I think the defendant has been guilty of a breach. In *George Hill & Co.* v. *Hill*, 55 L. T. N. S. 769, the covenant was that the party would not "engage in or be in any way concerned or interested in any similar business;" which was held to be broken where the covenantor was employed at a weekly salary; Kekewich, J., saying, at page 771: "I am of opinion that the words 'concerned in' were intended to cover this exact case, and I must regard them as meaning 'having something to do with a similar business.'" So in *Jones* v. *Heavens*, 4 Ch. D. 636, where the covenant was "not to carry on or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade," within a certain area, it was held to be broken by the covenantor selling as a journeyman in the employment of a person carrying on the particular trade.

Then as to the second ground: All the parties to the

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agreement had been dealing in clear plate glass as part only of their respective businesses throughout the whole of the Dominion. They found that that part of the business was unprofitable; and, in order that it might prove profitable to each and every one of them, they consented to transfer that part of the business, and also their goodwill in it, to the consolidated company. Ferguson and Hill obtained for their clear plate glass the full value of it in shares of the consolidated company's stock; and they obtained for the goodwill of that part of their business $13,000, also represented by the stock of the consolidated company, which stock was afterwards sold by their assignee as part of their assets. According to the evidence the clear plate glass business, although growing, was at that time a very small portion of the business in which they were engaged. The covenant the defendant and his partner Ferguson entered into is a very limited one; being as to the dealing in only one article of a number in the business they were carrying on. Even as to that one article the restriction did not apply where any of the parties to the agreement bought clear plate glass for silvering purposes, and it was so used and dealt in by them. And there was the whole range of the other kinds of glass forming the larger part of Ferguson and Hill's business, in which they were free to deal.

Assume that Ferguson and Hill, being stockholders in the consolidated company, had been receiving dividends for five years, they could not in the face of their covenant have entered into competition with the company during that period in buying and selling clear plate glass. It would be a strange result to contemplate if at the end of five years they could sell out their stock for $26,000 (one-half of which represented the goodwill of their clear plate glass business) and then enter into competition with the consolidated company as to that one article for the balance of the period of twenty years.

Ferguson and Hill at the time the covenant was entered into were largely concerned as dealers in mirrors and mirror

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plates, and in other kinds of glass, and as bevellers. So that, the covenant being limited to one article out of many in connection with their business, is very much stronger in favour of the plaintiffs here than was the covenant in favour of the defendants in *Nordenfelt* v. *Maxim Nordenfelt, etc., Co.*, [1894] A. C. 535; [1893] 1 Ch. 630, where the whole of the plaintiffs' business and patents had been transferred to the defendants and the covenant was unrestricted as to space. See also *Cook* v. *Shaw*, 25 O. R. 124.

The covenant entered into by the defendant being of a very limited character, and as to one only of many articles dealt in in connection with the business of Ferguson and Hill, I do not consider the covenant as to space a wider one than was necessary for the protection of the plaintiffs.

The Cobban Manufacturing Company offered to engage the defendant as traveller, at a salary of $1,200 a year; and he says that the offer was coupled with a demand by the Cobban Company, that he should sign an agreement not to deal in clear plate glass for twenty years. In the face of the denial by the parties with whom he was negotiating, I hold that the offer was made untrammelled by any condition whatever.

Another point strongly urged by Mr. Biggs on behalf of the defendant was that the letters patent of the Consolidated Plate Glass Company are invalid because the Cobban Manufacturing Company could not validly enter into any agreement by which it could take stock in another company, that being beyond the powers of the charter of the Cobban Manufacturing Company, which had obtained a charter under the Dominion Act, on the 21st of January, 1890, for manufacturing, importing and dealing generally in moulding, picture frames, mirrors, house furniture, cabinet ware, plate glass, sheet glass, and articles of a similar nature, and bevelling, silvering, and executing other processes on glass, cabinet making, gilding, and similar works in all parts of the Dominion of Canada and elsewhere.

Effect cannot be given to the objection. The Consolidated Plate Glass Company is by its charter a duly incorpor-

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ated company in fact and in law; and whether the charter has or has not been improperly obtained cannot be tried in a collateral suit such as this is. Had the company been in a position to sue the defendant that objection would not have availed the defendant: *George Hill & Co.* v. *Hill*, 55 L. T. N. S., at p. 771. If the charter has been improperly procured, there is a way of obtaining a judgment of forfeiture and dissolution; but its validity or invalidity cannot be tested here.

The breach of covenant on the part of the defendant has perhaps not entailed very serious loss on the plaintiffs, although in one instance the consolidated company say that by reason of the defendant's interference in a contract they had to do the work almost at cost, and thereby lost about a hundred dollars. I think that the damages may fairly be assessed at two hundred dollars. The injunction is to continue, and the plaintiffs are entitled to be paid their costs.

The defendant appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 10th, 11th and 14th of September, 1896.

Biggs, Q.C., and *Lewis*, Q.C., for the appellant.
Ritchie, Q.C., and *Ludwig*, for the respondents.

November 10th, 1896. OSLER, J.A.:—

The objections urged by Mr. Biggs in his able argument against the right of the plaintiffs to the relief awarded by the judgment under appeal are substantially these:

1. That the agreement of the 12th of April, 1893, was *ultra vires* of and therefore not binding upon the Cobban Manufacturing Company (Limited), one of the parties to it, and therefore, the intention being that all parties should be bound not to carry on the specified business for the stipulated term in competition with the new company about to be formed, the agreement failing as to one, it failed as to all.

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2. That even if not *ultra vires*, yet it could be enforced if at all only by the Consolidated Plate Glass Company, and these plaintiffs had no sufficient interest in the covenant to enforce it either for an injunction or damages.

3. That the covenant not to carry on the particular business of dealing in clear plate glass bound only the firms, parties to it as such, and that the individual members of such firms were not personally restrained or bound thereby.

4. That the agreement was void, being contrary to public policy, imposing upon the defendant a restraint of trade larger in point of time and space than was necessary for the fair protection of the plaintiffs.

It was also contended not only that the defendant had not in fact broken the agreement, but that the plaintiffs had themselves disregarded it, and were in consequence disqualified to maintain the action.

These objections I will deal with in their order: and, first, whether the agreement was *ultra vires* the Cobban Company.

I agree with Mr. Biggs that if this be so the other parties to it cannot sue. The intention evidently was that all parties should be on equal terms, mutually bound, in consideration of transferring their agreements and the goodwill of their respective businesses of the like character, not to carry on such a business in competition with the new company in which all were to be shareholders for the stipulated term. If one was not bound and was at liberty notwithstanding the agreement to compete with the company, it is evident that a large part of the consideration for the agreement to the others failed, and great injustice would result if the restraint should prevail as to them, while not existing as to the co-covenantor.

The case is in this respect very different from that of *Ontario Salt Co.* v. *Merchants' Salt Co.*, 18 Gr. 540, which turned on the acquiescence of the defendants in the withdrawal of one of the parties to the agreement, and which in fact supports the proposition I have laid down as applicable to the circumstances of the case at bar.

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Now the grounds on which it is said that the agreement is *ultra vires* are two: (1) That the Cobban Company were thereby abandoning or selling or covenanting not to carry on a part of the business for which they had been incorporated, were, in short, agreeing to sell it to another company, and this, it is said, they could not legally do. (2) That as a manufacturing company not expressly empowered by their charter to deal in or purchase shares in another company it was *ultra vires* of the Cobban Company to take or agree to take shares in the Consolidated Plate Glass Company.

I think there is nothing in either of these grounds. The dealing in plate glass was but one of the many purposes for which the Cobban Company was incorporated. No special duty was imposed on the company by the Legislature to carry on their business, the public were not interested in their charter, and the abandonment of this one particular branch of business effected no change in the fundamental principle of their constitution. If a company under such circumstances determine that it is for their advantage not to carry on one part of their enterprise, the authorities shew that this is not *ultra vires*: Brice on Ultra Vires, 3rd ed., pp. 135, 138.

Moreover, in the case of such a corporation as this, the right to complain of the mode in which they carry on their business, or of the abandonment of an integral part of it, is a matter of which only a shareholder can complain, and here all the shareholders of the Cobban Company would appear to have been assenting parties to the transaction.

Then it is said that the Cobban Company had no power to deal in, or agree to take, shares in the new company.

It is observable that in the Act under which both companies are incorporated, R. S. C. ch. 119, loan companies are by section 93 expressly forbidden to use any of their funds in the purchase of stock in any other incorporated company. This section, however, is found in a group of sections which by section 86 are declared to apply to loan companies only. If this legislation is not to be taken as

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impliedly permitting other companies to purchase or deal in good faith and in connection with their business, that is to say, not by way of speculation simply in the shares of other companies, it at all events leaves the rights and powers of such companies in this respect to be dealt with on the general principles of law applicable to them. It is then clear that it is not *ipso facto ultra vires* for one trading corporation to become the holder of shares in another: *Canada Life Assurance Co.* v. *Peel General Manufacturing Co.*, 26 Gr. 477; *In re Barned's Banking Co.*, L. R. 3 Ch. 105; *In re Asiatic Banking Corporation*, L. R. 4 Ch. 252. We are, however, relieved from the necessity of determining whether in the present case it would be beyond the powers of the Cobban Company to accept shares in another company in *bonâ fide* part payment for property transferred to them, because in point of fact the agreement provides that the shares may be taken not by the Cobban Company but, as they ultimately were taken, by F. J. Phillips and W. C. Phillips in trust for the company, a provision which seems to me to meet the difficulty suggested, or rather shews that it is unfounded in fact: see *Great Western R. W. Co.* v. *Metropolitan R. W. Co.*, 9 Jur N. S. 562.

This, therefore, in my opinion, fails.

The next question is whether these plaintiffs can sue, and if so, what is the nature of the relief they are entitled to?

The agreement appears to have been fully carried out, except as regards the breach thereof by the appellant defendant and his refusal to enter into a covenant with the new company directly, in the same terms as the covenant now sought to be enforced. The new company was incorporated; the property of the several firms and the corporation parties to the agreement were transferred to the company in accordance with its terms, and the shares in that company agreed to be taken on account of purchase money were duly allotted and taken up. The plaintiffs are still holders of their shares, but the defendant and his

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partner having made an assignment for the benefit of their creditors their shares have passed into other hands.

Upon the best consideration I have been able to give to the question, I am of opinion that the action well lies at the suit of these plaintiffs to enjoin the defendant from breaking his covenant, though it may be that the company could also have sued.

Leather Cloth Co. v. *Lorsont*, L. R. 9 Eq. 345, was an action by the company to restrain the breach of a covenant of a similar nature to that in question in the case at bar. The agreement appears to have been made before the incorporation of the company between the owners of the property intended to be acquired by the projected company on the one part, and an agent for the company on the other. It appears also that the only relief sought was an injunction.

But whether the new company could have sued or not, it is impossible to deny that the plaintiffs as shareholders in it are interested in the observance of the covenant, and with all deference I cannot but be of opinion that the difficulty of assessing substantial damages for the breach is no reason why an injunction should be refused. If it is an existing covenant, and the plaintiffs are interested in its observance, why are they not entitled to that relief? I rely on *Leech* v. *Schweder*, L. R. 9 Ch. 463, and the cases cited in the judgment of Jessel, M. R., reported in a note to that case. That learned Judge lays down the law thus: "Now how does the matter stand on the authorities as to granting injunctions in case of covenant? It is clearly established by authority that there is sufficient to justify the Court interfering if there has been a breach of the covenant." And then he refers to the cases: *Dickenson* v. *Grand Junction Canal Co.*, 15 Beav. 260; *Tipping* v. *Eckersley*, 2 K. & J. 270; *Western* v. *MacDermott*, L. R. 2 Ch. 72. And see *Tod-Heatley* v. *Benham*, 40 Ch. D. 80; 59 L. T. N. S. 25; 60 L. T. N. S. 251; *Sadler* v. *Great Western R. W. Co.*, [1895] 2 Q. B. 688.

I refer also to *Ontario Salt Co.* v. *Merchants' Salt*

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Co., 18 Gr. 540, a case in some respects not unlike the present. There several incorporated companies and individuals engaged in the manufacture and sale of salt, entered into an agreement to combine and amalgamate under the name of the Canadian Salt Association. It was agreed that the parties should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees. No party was to withdraw from the agreement until six months after its date, and then not until after three months' notice. The breach complained of was the sale of salt by the defendants, one of the parties to the agreement, in contravention of the covenant. It was held that the agreement was not void or contrary to public policy; that it was not *ultra vires* of the corporations parties to it, and was such in its nature as the Court would enforce.

I cannot agree with that construction of the covenant contended for by the defendant, which would limit it to the firms as such who were parties to it leaving the individual members of such firms free from its contract. I think the contrary of this is expressed with reasonable clearness.

The objection that the agreement is void as imposing a larger restraint of trade than is reasonable under the circumstances, also, in my opinion, fails. The particular business sold, dealing in which by the vendors is restrained, is one in which customers were sought for and intended to be sought for all over the Dominion. It was only one out of a number of trades or branches of the business of dealing in glass with which the defendant was connected and was carrying on. A very large price was paid to him and his partner for their stock and goodwill.

On the principles laid down in *Nordenfeldt* v. *Maxim Nordenfeldt Guns, etc., Co.*, [1894] A. C. 535; [1893] 1 Ch. 630, I think the restriction was not wider than was reasonably necessary for the protection of the covenantees and the new company in carrying on the business they were acquiring from the defendant and his co-vendor.

I refer particularly to the language of Lord Herschell, at pp. 548, 549, and to that of Tindal, C. J., in *Horner* v. *Graves*, 7 Bing. 735, 743; and *Hitchcock* v. *Coker*, 6 A. & E. 438. Judgment. OSLER, J.A.

On the questions of fact I agree with the learned trial Judge. I think the defendant was guilty of a breach of the agreement, the terms of which are quite wide enough to include the particular things he is shewn to have done. The cases cited by the learned Judge, *George Hill & Co.* v. *Hill*, 55 L. T. N. S. 769; and *Jones* v. *Heavens*, 4 Ch. D. 636; and the case of *Showell* v. *Winkup*, 60 L. T. N. S. 389, may be referred to on this point.

I think that the plaintiffs failed to prove that they had sustained any actual damage, and the judgment should be varied in that respect but otherwise affirmed.

MACLENNAN, J. A. :—

It was very strenuously contended by Mr. Biggs that the agreement in question was to be construed not as binding the defendant Hill or his partner Ferguson individually, but merely the partnership firm of which they were the members, described in the agreement as trading under the name style or firm of The Toronto Plate Glass Importing Company. He argued that this was apparent from the fact that the Cobban Company, an incorporated company, is expressed to be the party of the first part, and that the members of each of three partnership firms are collectively expressed to be the parties of the second, third and fourth parts. He also argued that the whole scope of the agreement indicated that it was the respective firms, and not the individuals composing them, which were to be bound by the covenants. I am unable to agree with this contention. The instrument is a deed, and is sealed by all the individuals. There cannot be a deed of a partnership firm, as distinct from the individuals composing it, and it would require very express stipulation in the language of a deed to confine its obliga-

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tion to a partnership firm, and at the same time to leave the individual members free; there is no such language in this deed.

I also think there is no objection to the covenant on the ground that the restriction is too large. As pointed out in the judgment, it is only one particular article of the trade in which the parties were engaged to which the restrictive covenant applies, and inasmuch as the company to be protected was intended to operate throughout the Dominion, I see no reason why, for a sufficient consideration, the defendant might not agree to leave the whole field to the company for twenty years: *Nordenfelt* v. *Maxim Nordenfeldt Guns, etc., Co.*, [1894] A. C. 535; [1893] 1 Ch. 630.

I think, too, the language of this covenant is so wide as to cover the case of a mere agent or salesman having no interest in the profit arising from sales of or dealings in plate glass. It is forbidden to be "in any way directly or indirectly engaged, concerned, or interested in, the business of buying, selling or dealing in clear plate glass." I think a person who sells as an agent for another, or who solicits or takes orders for the real seller, is a person engaged and concerned in selling and dealing in the goods sold: *George Hill & Co.* v. *Hill*, 55 L. T. N. S. 769; and I think it is shewn that the defendant was so engaged and concerned, and was, therefore, guilty of a breach of this covenant.

I should require further consideration to hold that the business carried on by Pearson and the defendant's wife, or the subsequent business of Hill & Rutherford, was in reality the defendant's business, and not that of his wife. In the view I take of the case it is not necessary so to decide, and I abstain from doing so.

The only formidable objection to the judgment is the alleged invalidity of the covenant for want of mutuality, on the ground that it is not and never was binding on one of the parties thereto, namely, the plaintiffs the Cobban Company, as being *ultra vires*. The charter of the Cobban Company has been put in. It is a Dominion charter under the Great Seal issued in January, 1890, in pursuance of

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R. S. C. ch. 119; and empowers the company to acquire the assets, goodwill and firm name of an existing business under the name of the Cobban Manufacturing Company, and continuing and extending the same business, and manufacturing, importing and dealing generally in mouldings, picture-frames, mirrors and house furnishings, cabinetware and plate glass, sheet glass, and all articles of a similar nature, and bevelling, silvering and executing other processes in glass, etc., in all parts of the Dominion and elsewhere. It is said that having regard to this charter and these powers the execution of the deed in question by the Cobban Company was beyond its powers and void; and that unless that company was bound by the covenant in question neither was the defendant.

A question whether, or how far, the Cobban Company might be bound seems to have arisen at the time of the execution of the deed. One of its provisions is, that "the respective parties hereto shall subscribe for and take stock in said company as follows: The said party of the first part (or the said Francis John Phillips and William Charles Phillips in trust for the said party of the first part), 555 shares," etc. And there is endorsed upon the deed a covenant by F. J. and W. C. Phillips expressed to be with the several parties to the agreement other than the Cobban Company, to assume responsibility for and on behalf of that company, "for the due fulfilment by the company of all the terms and conditions on the company's part under the terms of the agreement to be performed and fulfilled." It must be conceded to have been *ultra vires* of the Cobban Company to agree to take or to take shares in the new company; and accordingly they did not do so, but the shares were taken by the Phillipses as provided for in the deed. It is not a matter of which the defendant can complain that the Cobban Company itself did not take shares in the new company, for by the express terms of the deed they might be taken by the Phillipses, and whether the trust for the company was good or not, was, I think, not of the essence of the deed, or a matter which

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concerned the defendant at all. I do not think, therefore, that the defendant is relieved from his covenant because the Cobban Company did not become a shareholder in the new company, and that the Phillipses did so in their stead. I think that in that respect what was done was in accordance with the deed. It is, however, contended that it was *ultra vires* of the Cobban Company to enter into the restrictive covenant, and that is the question upon which I think the appeal turns. We have seen what the Cobban Company's business was. They dealt in clear plate glass, as well as in all other kinds of glass. They were also manufacturers of goods made wholly or partly of glass. They had a supply of clear plate glass in stock, and they had various contracts pending in relation to that kind of glass. Was it within their charter powers to agree to sell their stock of that kind of glass, and their pending contracts relating thereto, to a company to be formed, and in consideration of the sale to agree not to compete with the new company in that kind of goods for twenty years, or such shorter period during which the new company might continue to deal therein? No authority was cited to shew that such a company might not so agree, and I see no good reason why it should not. I can well understand how it might be a most wise and profitable thing for such a company, for the sake of making a sale of a large stock of a particular kind of goods, to agree with the purchaser not to compete with him in the same goods for a certain time. That is all that was done here. The Cobban Company had a stock of clear plate glass on hand, and they had contracts for more, and they agreed for the sale of their glass, and their existing contracts, and the goodwill connected therewith, to a company to be formed, and as part of the consideration not to compete with the new company. It is true, that it was apparently contemplated that the price of the goods sold should be paid by credit upon the shares in the new company agreed to be taken by the Phillipses, and that the transaction was carried out in that way. But that was no part of the agreement.

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According to the agreement the Cobban Company could insist on being paid in cash, and not by a credit on shares, and the validity of the original agreement cannot be affected by the subsequent act of the directors of the Cobban Company, in illegally accepting payment for the company's goods by a credit on the new company's shares.

I therefore think the agreement is not invalid on the ground of want of mutuality, or because it is *ultra vires* of the Cobban Company.

Then, does it make any difference that the restriction agreed upon was for the benefit of a company not yet in existence, and intended to be formed subsequently? I do not think it does. The new company was formed as intended; the shares were subscribed; the defendant and his partner claimed the consideration for which they gave their covenant; they sold their goods to the company; the price was ascertained, and credit therefor given upon the shares subscribed by the defendant and his partner, and their shares have since been disposed of for the benefit of their estate, and it is most just that the defendant should be held to his covenant. I do not think the case is governed by the decision in *In re Empress Engineering Co.*, 16 Ch. D. 125. The covenant in question was with the plaintiffs, was for valuable consideration moving from the plaintiffs, the benefit of which has been received by the defendant, and the plaintiffs had and still have an interest in its observance by him. I think it cannot be doubted, that if one covenant with another that if that other sell his business to a third person he will not compete with that third person, such a covenant is good. I think that is established by the decision of the Court of Appeal in *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335. There it was held that the benefit of such a covenant, since it adds value to the goodwill of a business, passes on an assignment either of the goodwill or of the beneficial interest in the business, and that the agreement may be enforced by the assign, although assigns are not expressly mentioned in the agreement; also that in the absence of express stipulation to the contrary

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such a covenant continues notwithstanding the covenantee has removed his business to another place, or has assigned it to a third person, or has retired from it without assigning it. Here both the beneficial interest and the goodwill of the plaintiffs' businesses were both agreed to be assigned, and were in fact assigned, and it follows that the covenant continues, and still binds the defendant.

It was objected that the new company should have been the parties to sue, and that the plaintiffs could not maintain the action. It may be that the new company could have sued, or would be proper co-plaintiffs. But inasmuch as the present plaintiffs are the covenantees, and as shareholders in the company have an undoubted interest in the observance of the defendant's covenant, they can maintain the action, both on their own behalf and as trustees for the company. That was so held in *Showell* v. *Winkup*, 60 L. T. N. S. 389. I have not observed that any objection for want of parties was made at the trial; and none was made in the statement of defence. If objection had been made, or if the defendant had made an application before or at the trial, the company might have been added. There has been no express assignment of the covenant, and therefore *primâ facie* the covenantees may sue. In *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345, the action was by a company upon a covenant made before its formation with a trustee for its benefit, and no objection was taken that it could not be maintained.

It was also objected that the plaintiffs had sustained and proved no substantial damage.

I think that objection well taken. It is admitted that the damage, if any, is that of the company. But it does not follow that because there is no substantial damage there may not be an injunction. If the defendant has broken his covenant it is no answer that there has been no damage: *Leech* v. *Schweder*, L. R. 9 Ch. 463, *per* Jessel, M. R., 468 (*n*); *Tod-Heatley* v. *Benham*, 40 Ch. D. 80. Therefore while I think the judgment for $200 damages ought not to stand, I think the injunction was properly granted.

The judgment should, therefore, in my opinion, be varied, by striking out the award of damages, and confining it to the award of an injunction. Judgment. MACLENNAN, J.A.

BURTON, J. A.:—

I am of the same opinion.

HAGARTY, C. J. O.:—

I cannot find that an objection raised in the argument before us as to the right of the plaintiffs to maintain this action, and that it was for the new company, not for its promoters, to bring an action, or ask for protection by injunction, was urged before the learned trial Judge. He has discussed very fully all the matters brought out in the lengthy trial, but I can find no allusion to this point. It is not taken in the voluminous statement of defence, nor in the reasons of appeal.

For myself I cannot understand on what principle this action can be supported. The damage, if any, occasioned by the breach of the agreement was damage to the intended company in its business and occupation. The company is no party to this action, and for all we know, does not complain.

The parties to the contract make their non-competition with the projected company a basis of agreement. If the company had never been formed the whole thing fell to the ground.

When formed it had its own rights to protect, one of such rights and advantages was not to have the competition of the parties entering into the agreement and becoming shareholders in the joint stock. They were technically not legal contracting parties, but their equity to restrain competition by any of these promoters who joined to form the new company and took stock therein seems clear.

The subject is well discussed in *Edwards* v. *Grand Junction R. W. Co.*, 1 M. & Cr. 650, in a judgment of Lord

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Cottenham. This case was to enforce against a proposed company when formed, an agreement made between the plaintiffs and its promoters, in which the plaintiffs had acted. It is fully discussed in Lindley's Law of Companies, 5th ed., p. 150.

It is treated as being too wide in its language, but the principle for which I here cite it, is not questioned, viz., "that the company have succeeded to and are in possession of all that the projectors had before—entitled to all their rights, and subject to all their liabilities."

The learned Judge here awards damages specially based on a loss sustained by the company in its business by the defendant's intervention. That was wholly their damage, not the damage of the plaintiffs, or any of them, who may or may not have retained the stock at the time such damage accrued.

I have no doubt as to the new company's right to restrain any competition by its promoters and shareholders, parties to that agreement, but I am satisfied that by the company, and by it alone, can damages or an injunction be recovered.

In *Beatty* v. *Neelon*, 12 A. R. 50, I gave my reasons in full for holding that in a case of this nature the company when formed could alone sue, and not one promoter against his fellow for alleged breach of agreement and fraudulent representation as to the property to be brought into the proposed concern.

My brother Burton differed from me on this point, but all the Court agreed in dismissing the action on the merits.

An appeal to Ottawa, 13 S. C. R. 1, was dismissed also on the merits, the Chief Justice holding that the objection to the frame of action need not be discussed. One learned Judge held with the plaintiff on the merits, but does not discuss the form of action. Two of the other Judges held distinctly against the right of action, that it could only be in the company.

In my view it is not necessary to discuss the many other points in the case. The action should have been dismissed.

Judgment.

HAGARTY, C.J.O.

In the view I take it is not necessary to discuss whether, although no damages are recoverable, yet the plaintiffs may be entitled to an injunction. There are cases in which an injunction may go, although actual existing damage is not shewn. But as I hold here that no right remains in the plaintiffs, but all is transferred to the company, the latter alone can proceed by injunction.

It would be a strange result if the new company had specially allowed the defendant Hill to enter, as he did, into business, and for some purpose of their own allowed his apparent competition with them in their business, and then that Hill should still be liable to be enjoined against his so doing at the suit of his co-promoters, who might any day cease to be shareholders, and this, too, in a suit to which the company was not a party.

Appeal dismissed, HAGARTY, C. J. O., *dissenting.*

GRIMES v. MILLER.

Malicious Prosecution—Arrest—Trespass—Justice of the Peace—Damages.

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate who thereupon without jurisdiction convicts and commits the accused to gaol is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution.

Smith v. *Evans*, 13 C. P. 60; *Stephens* v. *Stephens*, 24 C. P. 424, referred to.

Anderson v. *Wilson*, 25 O. R. 91, considered.

His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest or whether the conviction and imprisonment were the acts of the magistrates alone.

There was evidence upon which the jury might have reasonably found that the complainant, before laying the information, assisted in arresting the plaintiff. The case was left to the jury, by ROBERTSON, J., as one of trespass as regarded that arrest, and of malicious prosecution as to the subsequent proceedings, and they found a general verdict in the plaintiff's favour for $200 damages :—

Held, HAGARTY, C. J. O., dissenting, that there must be a new trial.

Statement. THIS was an appeal by the defendants from the judgment of ROBERTSON, J., in an action for malicious prosecution and assault.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

This action was brought by the plaintiff against both defendants for assault and false imprisonment, and against the defendant Miller also for the malicious prosecution of the plaintiff on a charge of unlawfully leaving the defendant's employment. The case was tried before ROBERTSON, J., and a jury, at the Toronto Winter Assizes, 1896. The jury found a general verdict against the defendant Miller of $200, and against the defendant Kennedy of $50.

At the trial it appeared that in December, 1894, the plaintiff, who had then recently arrived in this country, was hired by the defendant Miller, according to his own account at the rate of $10.50 per month, no special time being specified, but according to the defendant for a year at $125. The parties appear not to have got on

Statement.

together very well, and on the 25th of March, the plaintiff having by some excuse got Miller out of the way, went off with his belongings to the nearest railway station. Miller being told of this on his return, went to a magistrate, one Simpson Rennie, told him the facts, and asked his advice. Rennie advised him to try to stop or detain the plaintiff, not, perhaps, meaning that he should actually arrest him. Miller, however, went into the village, enquired for the constable, and was directed to the defendant Kennedy, who sometimes acted as constable. Kennedy and Miller went to the railway station where they found the plaintiff. According to one account Miller said to Kennedy, "arrest that man," and Kennedy caught the plaintiff by the arm, and said "you must come with me." According to another, Miller merely pointed out the prisoner to Kennedy on the platform, saying "that is the man;" whereupon Kennedy, in a friendly manner, laid his hand on the plaintiff's shoulder, saying, "you had better come with me," but that the latter knew he was under no compulsion, and was at liberty to go or stay as he pleased. He went, however, with Kennedy, who put him into a room in the town hall, and left him there. Whether the door of the room was locked or fastened, or whether there was any lock on it at all, or whether the plaintiff remained in custody until the afternoon when the magistrates appeared and tried the charge afterwards laid, were matters very much in dispute at the trial.

Miller meantime after leaving the station went, as Rennie had advised him, to see another local magistrate, one Clark, to whom he also told the facts. Clark advised him to let the man go, but that they had better first see Rennie again. They did so, and the result was that it was arranged that the two magistrates should go to the village in the afternoon, and dispose of the matter. Miller and the magistrates met at the hall accordingly. The plaintiff was there, but not the defendant Kennedy. Hobbs, the village constable, was present some time during the trial, but the plaintiff was not in his custody up to that time.

Statement.

Proceedings appear to have commenced by the magistrate (Clark) drawing up an information which was sworn to by Miller. He said that the information was laid on his advice after Miller had stated all the facts to him. The information charged that Grimes, on the 25th of March, being at the time under a contract of hiring with Miller, and before the said contract was completed, did unlawfully leave the complainant's employment in contravention of the statute in such case made and provided.

The magistrates then proceeded to hear the complaint, taking the evidence of Miller and the plaintiff. The following minute of conviction or order was made thereon: "Defendant was ordered to repay to complainant $5 found to have been overpaid him, and $5.35 costs, or in default, imprisonment for twenty-one days" ;and a conviction was afterwards returned by the magistrate Clark in the following terms:

"Be it remembered that on the twenty-fifth day of March, A.D. 1895, complaint was made before the undersigned, one of Her Majesty's Justices of the Peace in and for the County of York, for that one Thomas Grimes at the township of Scarborough on the twenty-fifth day of March, A.D. 1895, being at the time under a contract of hiring with one William Miller and before the said contract was completed or otherwise lawfully terminated did leave his employment without the consent of the said William Miller being first obtained, and having received payment of wages to the extent of five dollars over and above what he had earned or was otherwise entitled to under the terms of said contract, contrary to the provisions of the statute respecting Masters and Servants.

And now on this day, to wit the twenty-fifth day of March, A.D. 1895, the parties aforesaid appear before me the said justice to answer to said complaint; and now having heard the matter of the said complaint I do adjudge the said Thomas Grimes to pay to the said William Miller the sum of five dollars forthwith, and also to pay to the

said William Miller the sum of five dollars and thirty-five cents his costs in that behalf, and if the said several sums be not paid forthwith then I adjudge the said Thomas Grimes to be imprisoned in the common gaol of the said county at Toronto in the said County of York for the space of twenty-one days, unless the several sums and costs and charges of commitment and conveying the said Thomas Grimes to the said common gaol shall be sooner paid." Statement.

A warrant of commitment was then made out by Clark and given to the constable Hobbs, under which the plaintiff was arrested and imprisoned. The conviction was on motion quashed by the Court, but not before the plaintiff had suffered the full term of imprisonment.

The appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 14th and 15th of September, 1896.

F. E. Titus, and *S. H. Bradford*, for the appellants. The learned Judge was wrong in leaving the case to the jury as one for malicious prosecution. The fact that the prosecution was misconceived is not sufficient to impose liability. There must be a legal prosecution and want of reasonable cause: Shirley's L. C., 2nd ed., p. 323; *Brown* v. *Hawkes*, [1891] 2 Q. B. 718; *Cohen* v. *Morgan*, 6 D. & R. 8; *Hicks* v. *Faulkner*, 8 Q. B. D. at p. 170; *Smith* v. *Evans*, 13 C. P. 60. The evidence does not go far enough to make Miller responsible for the arrest and Kennedy clearly had nothing to do with the prosecution, so that the general verdict cannot stand.

E. E. A. DuVernet, and *F. McMichael*, for the respondent. All the proceedings were illegal and unfounded, and there could be no reasonable and probable cause. The evidence as to the arrest is clear, and the moderate damages allowed should not be interfered with.

F. E. Titus, in reply.

Judgment. November 10th, 1896. BURTON, J.A.:—

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There was ample evidence to warrant the conclusion of the jury that Kennedy improperly and illegally detained the plaintiff in custody, and no grounds have been disclosed for interfering with that verdict.

The verdict against Miller involves more serious consideration. I cannot say that I am so much surprised at the magistrates making the mistake they did in acting upon a statute that had been repealed some years before, as they found it in the Consolidated Statutes, and being unversed in law, they not very unnaturally fell into the error of supposing it to be in existence. A great many magistrates in England, some of far superior education, such as clergymen and officers in the army and navy, acting in a similar capacity, would, but for their having the assistance of a professional clerk, be very likely to fall into similar error, and I am not, therefore, surprised that the Court, when quashing the conviction, protected them against an action. The departure from the original information, and dealing with the matter as if it fell under the present Master and Servants' Act, and sending the plaintiff to gaol for twenty-one days, was a much less venial matter, and shews not only inexcusable ignorance, but a disregard of the rights of others which is astonishing. They are, however, relieved, and the question is, how far is the defendant Miller affected by those proceedings before the justices?

The complaint of the plaintiff upon this branch of the case is in the nature of an action for a malicious prosecution, and it is singular to find the diversity of opinion which has existed and in some quarters apparently still exists as to that kind of action being maintainable, when, as in this case, the magistrates acted wholly without jurisdiction.

That the magistrates would be liable in trespass under such circumstances unless protected goes without saying, but whether the party laying the information would be

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unless he actually interfered in making the arrest, has been questioned by Judges of great ability.

In the case of *Hunt* v. *McArthur*, 24 U. C. R. 254, in our own Courts, Chief Justice Draper uses this language:— "If the magistrate had been acting in his jurisdiction, and the arrest and imprisonment were only the consequence of the defendant's maliciously and without reasonable or probable cause putting the magistrate in motion, the present form of action would be right. But the magistrate was not so acting; he could neither entertain the complaint, nor issue a warrant upon it, under the circumstances appearing; and then it is as if the defendant had himself directed the arrest of the plaintiff on an unfounded charge, in which case trespass is the proper remedy."

The result was that the action there was held to be misconceived and was dismissed. It is not quite clear whether the learned Judge intended to intimate that the defendant would be liable in trespass even if he had taken no active part in making the actual arrest, or in praying for the issue of a warrant.

The learned Chief Justice in his judgment refers to *Chivers* v. *Savage*, 5 E. & B. 697, in which an opinion is expressed that a party so acting would not be liable in trespass if he did not make or direct the arrest.

In *Elsee* v. *Smith*, 2 Chit. 304, 1 D. & R. 97, Abbott, C. J., expresses himself in this way: "If the warrant be not illegal and void in its form, and be founded on the matter laid before the justice, and as he as a justice of the peace had authority to grant such warrant, then the present action (malicious prosecution) is proper in its form, for falsely and maliciously causing the magistrate to grant a warrant to do the act complained of."

Whilst Holroyd, J., in the same judgment, says: "If the warrant issued without due authority on the part of the magistrate, that would be trespass in the magistrate; but it by no means follows that it is trespass in the party who, by laying the information before the magistrate, is the cause or instrument on which the magistrate acts

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in granting his warrant." And again: "If the warrant was illegal, and the defendant himself went with the officer to execute it, that might make him a guilty trespasser."

In *Turpin* v. *Remy*, 3 Blackf. 210, it is said that an action for malicious prosecution can only be supported for the malicious prosecution of some legal proceeding before some judicial officer or tribunal. If the proceedings complained of are extra-judicial the remedy is trespass and not an action on the case for malicious prosecution.

In *Morris* v. *Scott*, 21 Wend. 281, it was held that although trespass was the more appropriate remedy where the Court had no jurisdiction, yet an action on the case for malicious prosecution would lie provided that malice or falsehood were alleged as the gravamen of the charge, and the arrest or other trespass were alleged merely as a consequence.

In the case of *West* v. *Smallwood*, 3 M. & W. 418, the magistrate had general jurisdiction over the subject matter, although he had no authority to issue a warrant in the particular case. Lord Abinger thought the action was misconceived and ought to have been case; and that although the magistrate would have been liable in trespass, the party laying the information would not, unless he took some part in the arrest.

I think that the weight of authority is in favour of the view that an action for malicious prosecution is not maintainable in a case like the present. The essential ground of such an action is that a legal prosecution was carried on maliciously and without probable cause, and there is no similitude between it and an action of trespass or false imprisonment. An action of trespass is for doing something which is manifestly illegal with or without malice.

Then, is the defendant liable in trespass? It is contended that the whole proceedings are *coram non judice*, and that all the participants therein are wrongdoers to the extent to which they participate. I do not question

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that proposition. It is clear that if this had been within the jurisdiction of the magistrate the responsibility of both defendants for the arrest would have terminated with the arraignment of the plaintiff before the justices, and subsequent proceedings before them would have been the subject of an action on the case only in the event of his being able to establish malice and the absence of reasonable and probable cause; but I agree with those Judges who have intimated that a person cannot be held to be guilty of a trespass unless he either acted personally in the arrest, or expressly authorized some one to act for him; his giving his evidence, or refraining from interfering when the magistrate issued his warrant, cannot make him a trespasser, though a very trifling interference might have furnished evidence for a jury.

I am of opinion, therefore, that the defendant Miller cannot be made liable as a trespasser for what was done by the magistrates, and as the damages have been assessed against him for $200, presumably for both causes of action, that verdict cannot stand.

The result is that a verdict of $50 stands against Kennedy, whilst Miller, who instigated him to make the arrest, and who agreed to indemnify him, escapes altogether, and would be entitled to have judgment entered in his favour.

This can scarcely be regarded as satisfactory, and a new trial must necessarily be ordered as to Miller. But as Kennedy, as matters now stand, is not in a position to claim any right to indemnity, it would, we think, be more conducive to the ends of justice to order a new trial generally.

It has been an unfortunate affair all round, and although we cannot make an order to that effect, we would suggest that it might be in the interest of all parties if a verdict were entered for $50 against both defendants with costs. If a consent to this effect is not filed within two weeks a new trial is granted, costs to abide the event. The defendants must have the costs of the appeal.

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OSLER, J.A.

OSLER, J. A. :—

It would seem that the magistrates in taking the information and advising the defendant to lay it, acted as they supposed under the provisions of the former Master and Servant's Act, C. S. U. C. ch. 75, though there is nothing in that Act, even were it still in force, which authorized such an order or conviction as was actually made.

The learned trial Judge ruled that there was evidence of an actual arrest of the plaintiff at the railway station by Kennedy at the request of Miller; and on the question whether there was any reasonable or probable cause for the subsequent prosecution, charged the jury as follows:—

"If I had found that Miller had reasonable cause for suspecting something wrong, then I would have told the jury that Grimes was here, but had no business to be here; that there was reasonable and probable cause for Miller doing what he did, and, therefore, that Miller was justified in law; but, gentlemen, no case of that kind, or question of reasonable and probable cause, applies where a man is charged with having committed a crime against the law, and it turns out to be nothing, and he is acquitted. * * * The man was charged with having committed an act which was not a crime. It is not a crime for a man to break a contract. It is not a crime that is punishable by imprisonment or fine. So that the question of reasonable and probable cause does not come up at all, and that is the reason I would give that Miller cannot be justified on the ground of having reasonable and probable cause. Then the next question is: the plaintiff says Miller was actuated by malice, etc."

This part of the case, therefore, went to the jury as a claim for malicious prosecution simply, for which in its very nature there could be no reasonable and probable cause; and the ruling was that the only question for the jury, apart from the damages, was that of malice.

The Judge was not asked to rule that there was evi-

dence from which the jury might infer the liability of the defendant Miller as a trespasser for the imprisonment under the warrant.

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The case divides itself into two branches; the first for the arrest of the plaintiff at the railway station, and his subsequent detention at the town hall pending the appearance of the magistrates; and the second, for what occurred after the commencement of the investigation.

As to the first, it may be dismissed with the observation that there was evidence that the defendant Miller accompanied Kennedy to the station and pointed out the plaintiff to him as the person to be arrested or detained. That was evidence for the jury of his participation in the arrest: *West* v. *Smallwood*, 3 M. & W. 418.

The difficulty arises upon the other part of the case.

It must be conceded that the whole of these proceedings were *coram non judice;* that the magistrates had absolutely no jurisdiction whatever over the subject matter of which the defendant Miller complained, or on which he sought their advice, or over the person of the plaintiff, for the statute, under which the magistrates thought they had jurisdiction to take the information, if not repealed by 40 Vict. ch. 35 (D.), was, at all events not re-enacted in the Revised Statutes of 1877, and therefore had not been in force for nearly twenty years.

Against whom then, and of what nature is the plaintiff's remedy for the wrong inflicted upon him by the imprisonment under the warrant? The justices would no doubt have been liable had they not been protected by the order quashing the conviction. But Miller prayed no warrant for the arrest, and what he did in laying the charge entertained by the magistrates did not necessarily infer that it was to be followed up by committal. I mean that a further detention or commitment was not necessarily in the defendant's contemplation as a consequence of his complaint. There is no evidence that he requested the magistrates to commit, or that he took any part in requesting or making the actual arrest under the

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warrant. If, as it was quite open to the jury upon a proper direction to have found, this was clearly the act of the magistrates alone, exercising their own judgment as to the proper method of dealing with the complaint laid before them, and of the constable acting under their warrant, then, void as the whole of the proceedings must be conceded to be, the defendant would not be liable for anything done under the warrant. This is clear upon a multitude of authorities, to some of which it is under the circumstances necessary to refer: Ashhurst, J., in *Morgan* v. *Hughes*, 2 T. R. 225, at p. 231, laid down the principle thus: "Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy," *i.e.*, against the party laying the information. *Elsee* v. *Smith*, 2 Chit. 304, 1 D. & R. 97, was an action for maliciously procuring the issue of a search warrant. Holroyd, J., said: "If the warrant issued without due authority on the part of the magistrate, that would be trespass in the magistrate; but it by no means follows that it is trespass in the party, who, by laying the information before the magistrate, is the cause or instrument on which the magistrate acts in granting his warrant. * * He prays a search warrant to examine the plaintiff's premises. He does not * * pray this specific remedy by warrant for the apprehension of the plaintiff. * * If the warrant was illegal, and the defendant himself went with the officer to execute it, that might make him a guilty trespasser."

In *Carratt* v. *Morley*, 1 Q. B. 18, the defendant Morley had summoned the plaintiff in a Court of Requests presided over by certain commissioners. The plaintiff was not within the jurisdiction of the court. The commissioners heard the cause, gave judgment for the defendant, the claimant therein, and ordered the plaintiff to be committed to prison for sixty days, unless the debt and costs should be in the meantime paid. The clerk of the court thereupon issued

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a precept under his hand and seal directed to the sergeant of the court by way of *ca. sa.* for taking and committing, etc., the plaintiff to prison, unless the debt and costs were in the meantime paid. The plaintiff was arrested thereunder, and then brought an action of trespass against Morley, the commissioners who ordered his committal, and the sergeant who arrested him. It was held that the action lay against the commissioners and the sergeant, but not against Morley; the Court saying it was clear upon principle that a party who merely originated a suit by stating his case to a court of justice was not guilty of trespass, though the proceedings should be erroneous or without jurisdiction. The plaintiff there relied upon the *Case of the Marshalsea*, 10 Rep. 68*b*, 76*a*, and *Smith* v. *Bouchier*, 2 Str. 993, in both of which the proceedings complained of had been taken in a court which had no jurisdiction, and in which the defendant, suing in such court, was held liable in trespass. But that was because each of them had authorized and directed the arrest of the plaintiff, the one by issuing a *capias*, and the other by obtaining a warrant which in neither case had the court any jurisdiction to issue.

Rafael v. *Verelst*, 2 Wm. Bl. 1055, is important as shewing that the remedy by way of trespass depends upon whether or not the defendant can be said to have directly interfered in or caused the arrest of the plaintiff. In that case the plaintiff had been seized and imprisoned at Fyzabad, the capital of the Province of Oudh, then in the dominions of the Nabob, Sujah al Dowlah, by order of the Nabob, and it was found by the special verdict that the arrest and imprisonment were by the means and procurement of the defendant, the president of Bengal under the East India Company, but that the Nabob, though constitutionally independent of the East India Company, was, in ordering the arrest, under the awe and influence of the defendant, and acted contrary to his own inclination, being fearful of offending him. De Grey, C. J., said: "The great doubt is, whether, when an

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injurious act is committed by colour of juridical authority * * such act can be a trespass. * * I consider the Nabob as not being the actor in this case; but the act to be done, in point of law, by those who procured or commanded it; and in them it may doubtless be a trespass Sujah Dowlah was a mere instrument. He acted not from any motives of his own, but gave way through awe and fear. If, in the doing of an act, there be several intervening agents, and one happens not to be amenable, will it be said that all the rest are excused? Suppose it the very act of the Nabob, who lends himself to the defendant's will, and undergoes a voluntary servitude to his pleasure—the accidental circumstances of such a man shall not exempt the rest, who concur in the act. It is laid down in Foster 125, that *procuring* a felony to be committed makes an accessory to the felony; and I take it to be a settled rule, that whatever makes an accessory in felony will make a principal in trespass. Since, therefore, the jury have found the procurement of the defendant, it follows, that he is liable, as a principal, for this trespass." And Blackstone, J., said, that the imprisonment was found to have been committed not only "by the means and procurement, but by the command, nay, even the compulsion of the defendant. * * The Nabob is a mere machine—an instrument and engine of the defendant."

So in *Aitken* v. *Bedwell*, Moo. & M. 68, an action of trespass, where the captain of an English ship in a Russian port caused one of his crew to be imprisoned and flogged by Russian officers on shore, the question put to the jury by Lord Tenterden was, "whether the punishment inflicted on shore was done by the constituted authorities, on the mere complaint of the defendant, or whether the defendant was the actor and immediate promoter of it."

On the same principle it was held in *Hunt* v. *McArthur*, 24 U. C. R. 254, that a defendant would be liable in trespass who had *instigated and procured* a charge for obtaining money under false pretences to be laid against the plaintiff before a magistrate who had no jurisdiction over it, on which a warrant was applied for and issued, and

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the plaintiff arrested thereunder. There was evidence, therefore, on which the jury might find that the defendant was the real actor.

To the same effect is *Emery* v. *Hapgood*, 7 Gray 55, that a complainant who obtains a warrant from a magistrate who has no jurisdiction of the cause, and instigates and induces an officer to arrest the defendant thereon, is liable in damages to the party arrested even if the warrant be valid on its face. On the other hand, *Barker* v. *Stetson*, in the same volume, p. 53, affirms the rule that making a complaint to a magistrate does not render the complainant liable in trespass for acts done under a warrant issued thereon by the magistrate, even if the magistrate has no jurisdiction.

And see on this point *Taylor* v. *Trask*, 7 Cowen 249; *Curry* v. *Pringle*, 11 Johns. 444; *Smith* v. *Evans*, 13 C. P. 60; *Stephens* v. *Stephens*, 24 C. P. 424; *Anderson* v. *Wilson*, 25 O. R., at pp. 95, 96, *per* Armour, C. J.; Chitty on Pleading, 9th Am. ed., vol. 1, p. 182; Saunders on Pleading and Evidence, 2nd ed., vol. 2, p. 3; Clerk and Lindsell's Law of Torts, p. 137.

Then, does the action for malicious prosecution lie under the circumstances; that is to say, where a complaint is laid before a magistrate, not merely a defective statement of some crime or other matter over which he might have jurisdiction, but of something over which he by no possibility had jurisdiction, either as to subject matter or person, the whole proceeding being merely illegal and void?

If such an action does lie, I should deem it essential to the plaintiff's case to prove that the defendant knew that the proceedings which were being taken or promoted by him were altogether without colour of right; it would be in that manner only that the absence of reasonable and probable cause in such a case, apart from the defendant's knowledge of the untruth of the charge, whatever it might be, that he laid before the magistrates, could be shewn. The rule to be applied would be similar to that laid down by Lord Camden in *Goslin* v. *Wilcock*, 2 Wils. 302, "that if

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you hold a man to bail in an inferior Court where you know it hath not jurisdiction, and with malice, an action upon the case lies." See also *Johnson* v. *Emerson*, L. R. 6 Ex. 329, 373, 393-4.

If this be so, the action in this case fails so far as it is for malicious prosecution, for there is no evidence that the defendant Miller did not know and believe that the magistrates were acting within their jurisdiction, and had right and power to entertain his complaint and adjudicate upon it, and the charge was true in fact.

I am, however, strongly of opinion that no such action lies under the circumstances I have mentioned; indeed I do not know why the question should now be said to be a debateable one, if *Johnstone* v. *Sutton*, in the Exchequer Chamber, 1 T. R. 493, 544, affirmed in the House of Lords, 1 Bro. P. C. 76, be law. Lord Mansfield there said, in the Exchequer Chamber: "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal. The essential ground of this action is that a legal prosecution was carried on without a probable cause."

This exposition of the law has frequently been followed in our Courts, notably in *Hunt* v. *McArthur*, 24 U. C. R. 254, *Smith* v. *Evans*, 13 C. P. 60, and *Stephens* v. *Stephens*, 24 C. P. 424, already cited. Probably it will not be difficult to find expressions in cases earlier than *Johnstone* v. *Sutton*, which give colour to the opposite view; but in the face of the clear decision in that case I do not see how we can give effect to them. I had occasion to consider this question to some extent in the case of *Macdonald* v. *Henwood*, 32 C. P. 433, and a subsequent examination of it confirms the impression I then formed that a merely illegal and void proceeding before a magistrate who has no jurisdiction over the charge or the person, is not the subject of an action for malicious prosecution.

Judgment.

OSLER, J.A.

I have not found any case since *Johnstone* v. *Sutton*, in which it has been so held. There seems to me to be a clear distinction between such a proceeding as that, and a prosecution for a crime or offence which has failed by reason of some defect in the indictment and the plaintiff has not been acquitted on the merits, *e.g.*, a prosecution for the offence of perjury where the perjury was ill assigned: *Chambers* v. *Robinson*, 2 Str. 691; or where the plaintiff was indicted as constable for allowing a prisoner to escape, and he was acquitted because he was a headborough and not a constable: *Wicks* v. *Fentham*, 4 T. R. 247. *Pippet* v. *Hearn*, 5 B. & Ald. 634, was also the case of a malicious prosecution of a bad indictment for perjury. The Court said: "We are of opinion that, where a man maliciously prefers an indictment against another *for a crime*, he is liable to an action for it, although the indictment be defective." It may be that this language unduly narrows that of Lord Mansfield, who speaks only of a legal prosecution, and this may be what Lord Esher refers to in *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304, an action for malicious prosecution of the plaintiff for having committed an offence against section 51 of the London Tramways' Act, by having attempted to avoid payment of her fare. It was contended by the defendant that the action would not lie because the proceedings against the plaintiff were not criminal proceedings. The Court held that they were, but Lord Esher said: "I am not prepared to say that, if the proceedings taken against her in this case were not criminal proceedings, the action would not lie if those proceedings were taken without reasonable and probable cause and maliciously."

There had, in fact, been a summary legal prosecution of the plaintiff before a magistrate in respect of some charge, whatever its nature, over which he had jurisdiction.

I am, with all deference, unable to agree with the dicta on this subject in the recent case of *Anderson* v. *Wilson*, 25 O. R. 91.

In the American Courts there is great diversity of deci-

Judgment.

OSLER, J.A.

sion. I do not think that any useful purpose would be served by attempting to go through the cases. *Turpin* v. *Remy*, 2 Blackf. 210, may be referred to. In *Dennis* v. *Ryan*, 65 N. Y. 385, a discussion of the subject and an examination of many of the English authorities will be found in the dissenting opinions of two members of the Court.

On the whole it appears to me clear, after full consideration of the evidence and the learned Judge's charge, that we must allow the appeal.

I am not prepared to say that there is no evidence to connect the defendant Miller with the trespass under the warrant; but it is extremely slight, the great weight of the the testimony being that the conviction and issue of the warrant were the unsolicited acts of the magistrates alone in doing what they supposed to be their duty. The jury might well have found in favour of Miller on this point, with a proper direction. But, as to these proceedings, the case was not tried as an action of trespass. It was treated as an action for a malicious prosecution for which no reasonable or probable cause existed, and nothing was left to the jury but the question of malice. Even as an action of that kind the charge, as I have said, was wrong in a most material point. The result was that damages were given generally, not only for the trespass for which the defendant was undoubtedly liable, but also upon the other part of the case which has not been properly tried. A new trial, therefore, cannot be avoided, however much we may regret that result. This must be as to both defendants, because the case was left to the jury generally as to both of them, without making any distinction between their cases, or pointing out that Kennedy was not in the least responsible for the imprisonment under the warrant. It is not easy to understand how this could have happened, but the language of the learned Judge's charge leaves no doubt on the point. He said, with reference to the damages being separated: "I have made up my mind that there is no necessity for a separation of the damages for this reason, if no other, but there

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OSLER, J.A.

are other reasons. Kennedy says Miller told him that he would stand between him and all harm, and Miller says that is a fact. So I presume Miller has got to pay the damages and costs if any are awarded in this case against him or Kennedy either. So it is not necessary for you to say how much Kennedy should pay as apart from Miller. There is no doubt Miller is the man, if you find the facts as the plaintiff contends, he is the man who should pay the whole of the damages, but at the same time you cannot excuse Kennedy, because he was a party, if he was taking part in it." The objection to this part of the charge, as taken by Mr. Bradford, is: "I object that your Lordship should have told the jury that there was no evidence whatever against Kennedy on the malicious prosecution part of the case." His Lordship: "I did not tell them that there was no evidence, but I spoke about that, and I said as far as the damages were concerned, it did not make much difference, because the whole of the damages, according to arrangement, Miller was to pay."

This observation refers to something said by Kennedy or Miller in the course of the evidence, as to Miller having said that he would indemnify Kennedy, or would stand between him and all harm, a circumstance which ought not in the least to have entered into the question of what damages should be found against Kennedy for his own trespass. There was no evidence to connect him with the subsequent proceedings, and the case having been left to the jury in this general way as to both defendants, contrary to counsel's express objection, there has been a miscarriage, which compels us to direct a new trial generally.

MACLENNAN, J.A.:—

I am of the same opinion.

HAGARTY, C.J.O.:—

I think the arrest of and bringing the plaintiff before the magistrates was proved with reasonable clearness against both defendants.

Judgment.

HAGARTY, C.J.O.

The verdict of $50 against Kennedy, who merely acted in bringing the plaintiff up, was right and ought not to be disturbed. He was not concerned in any way with the question of malicious prosecution.

I do not think it was necessary to introduce into the discussion of this case the well-known rules governing actions for malicious prosecution.

There was no shadow of authority for the charge made by the defendant Miller as to the plaintiff leaving or deserting his employment, nor for the justices hearing or dealing with such a charge, nor for the justices ordering repayment of money said to have been advanced to the plaintiff above the wages due to him, nor for committing the plaintiff to gaol in default of payment of that amount and some $5 costs.

For all these proceedings there was no legal right. It was a matter over which the justices had not even any general jurisdiction or any right to adjudicate or make any order or disposition.

They send the plaintiff to gaol, where he lies for the whole sentence. The justices were undoubtedly trespassers, and without the slightest defence.

A malicious prosecution is generally supposed to be the setting the law in motion without reasonable or probable cause. But here we can hardly see that any law was set in motion. The whole proceeding was step by step unwarranted by any existing law.

The defendant charges an unlawful leaving of his employment on the plaintiff's part. This was a mere invention of a crime or misdemeanour unknown to the law—as worthless as if he charged the plaintiff with wearing a particular coloured garment. He procures an arrest on this and brings the plaintiff before a magistrate, who gravely draws out an information of the supposed misdemeanour, and the defendant swears to it.

Before the justices the defendant tells his story and gives in his account of moneys paid to the plaintiff and goods given to him, and the learned justices discuss the

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HAGARTY, C.J.O.

items and strike a balance against the plaintiff, bringing him in debt to his late employer, and gravely draw up a conviction, ordering him to pay this balance forthwith with over $5 costs, and in default to be imprisoned in the county gaol for twenty-one days, which imprisonment the plaintiff had to bear.

All this was done with the defendant Miller's full knowledge, and as the learned Judge says he saw the plaintiff carried off to gaol without intervention on his part.

He says he did not object to this conviction, as he thought he had no right to do so.

It is clear that he discussed the items and gave in his account against the plaintiff, and must have been aware of the view taken by the justices.

It seems to me impossible to suppose that the defendant Miller was not actively concurring in the extraordinary assumption of authority in the justices in making this absurd commitment and thus depriving the plaintiff of his liberty for twenty-one days for non-payment of an account.

The whole proceeding was simply illegal. It was as effectual as if Miller had consulted two of his neighbouring farmers; acted as they suggested; went over the accounts together and arrived at a sum they found overpaid to the plaintiff, and took the brilliant course of compelling its payment and their own costs by a committal to gaol—a legal farce, but of grim result to the plaintiff. The well-known words, "*Scenâ, non in foro, res agitur*," naturally recur to the mind.

I cannot believe that the familiar law as to a man fairly stating his case to a magistrate and acting in good faith according to his stated view of the law, can apply to such a travesty of legal procedure as here took place.

I think the defendant Miller is responsible with his magisterial advisers as a joint trespasser.

I think the total absence of any general jurisdiction in the magistrates over the subject matter takes the case out of the general rule.

Judgment.

HAGARTY, C.J.O.

I refer to *West* v. *Smallwood*, 3 M. & W. 418; *Rafael* v. *Verelst*, 2 Wm. Bl. 1055; *Austin* v. *Dowling*, L. R. 5 C. P. 534, at p. 540, *per* Willes, J.: "The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer and the commencement of the proceedings before the judicial officer."

If the justices here had any general jurisdiction over, or cognizance of, the matter here complained of, we can understand their action being that of a "judicial officer."

I think that the appeal should be dismissed.

Appeal allowed, HAGARTY, C. J. O., *dissenting.*

MAY V. LOGIE.

Will—Construction—Ambiguity—Elliptical Sentence.

A testator, after declaring the will in question to be his last will and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real and personal my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will":—*Held*, that the intention to devise the estate to the wife might fairly be gathered from this language.

Judgment of MEREDITH, J., 27 O. R. 501, affirmed.

THIS was an appeal by the plaintiff from the judgment of MEREDITH, J., reported 27 O. R. 501. Statement.

A testator, after declaring the will in question to be his last will and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real and personal my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

MEREDITH, J., held that the wife took an estate in fee.

The plaintiff appealed, and the appeal was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd and 23rd of September, 1896.

J. A. Donovan, for the appellant.

W. Mortimer Clark, Q.C., and *Shepley*, Q.C., for the respondents.

November 10th, 1896. BURTON, J.A.:—

Having regard to the peculiarity of this will and the reluctance sometimes felt by the Courts in supplying words which have obviously been omitted, I am not ashamed to confess that at the commencement of the argument I entertained considerable doubt as to the construction to be placed upon it.

Those doubts have now vanished, and I think I can venture to hold this to be a valid devise to the testator's widow without exposing myself to the charge of "having invented a will" for the testator.

Judgment.

BURTON, J.A.

I agree with the remark made by Lord Esher in *In re Harrison, Turner* v. *Hellard*, 30 Ch. D. 390, at p. 393, that "when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

Here the testator evidently intended to dispose of his whole estate.

He commences by revoking all former wills and declaring the document he was executing to be his last will and testament, and proceeds to declare that it is his will; that as to all his estate, both real and personal, whether in possession, expectancy or otherwise, which he might die possessed of—and then, without any express words of devise, adds "my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

The case I have referred to was peculiar, the will being on a printed form, and the testatrix having omitted to fill in the blank intended for the name of the legatee, but having added to the blank "to and for her own use absolutely," and having then appointed her niece, Catherine Hellard, her executrix.

It was contended there as here, that by filling up the blank the Judge had in effect made a will for the testatrix; that there was nothing to shew that it was intended that the party named was to be residuary legatee, and that the will was void for uncertainty, and could not be construed without making an addition to it.

It is true the will was one of personalty, and there being no one named in it but the executrix, she was held to take the property beneficially.

But the Court proceeded on the ground that where there is a reasonable construction that results in a testacy, that construction must prevail rather than one which leads to an intestacy.

This devise is not confined to personalty, but it is mani-

Judgment.

BURTON, J.A.

fest that the testator intended to devise everything he had, and he names no one but his wife. It seems to me to fall within that class of cases in which the will itself is incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words; but even so, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will in order to prevent an intestacy.

Here there is no one named except the wife, and she is named in the devising clause.

No one reading this will could entertain any moral doubt as to the intention of the testator to give all his property to his wife, and as an intestacy is the only alternative I think we are justified within the cases in placing that construction upon it.

If I had come to a different conclusion I incline to the opinion that the Statute of Limitations is a complete bar, but having come to a clear conclusion upon the construction of the will I deem it unnecessary to consider the other points.

OSLER, J.A.:—

It is evident that the testator meant to dispose of all his estate. He begins by declaring the will to be his last will and testament, revoking all others theretofore made by him, and it purports to be made as to all his estate, both real and personal, whether in possession, expectancy or otherwise, which he may die possessed of. "It is my will that" as to all this—what? The only answer supplied by the will is —"my wife Elizabeth;" and her appointment as executrix. Can a devise to the wife be spelt out of this, or may we supply words necessary to make out that sense? Meredith, J., seems rather to shrink from the latter course, and reads the words, "It is my will that as to all my estate

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OSLER, J.A.

* * my wife Elizabeth," as simply equivalent to the expression "I will all my estate my wife Elizabeth." If that be a permissible paraphrase of the testator's language, the case would present no difficulty, the omission of the word "to" after the word "estate," as indicative to the object of the devise—the person to whom the estate is "willed," being nothing more than a compression of the phrase, or, at worst, a slip in grammar. I doubt, however, if it is right to convert the language of a clause which, down to and exclusive of the words "my wife Elizabeth," is formal and precise, into a phrase which is neither the one nor the other, and then to say that the supposed verbal equivalent has the meaning which it would undoubtedly be capable of, but which you cannot take out of the clause as it stands, for the simple reason that it is an unfinished or incomplete clause, though rightly constructed as far as it goes. The will is not like that in *In re Harrison, Turner* v. *Hellard*, 30 Ch. D. 390, where the words were, "I give unto * * to and for her own use and benefit absolutely, and I nominate, constitute and appoint my niece, Catherine Hellard, to be executrix of this my will." There it was held that though the language was awkward and elliptical, it was capable of being read in a single sentence as a gift to Catherine Hellard. Here the precise phraseology of the clause refuses to lend itself to such a construction. The case seems to be one, in which if the will is to be read at all, it must be by supplying words which we may infer have been omitted, such as "is to have the same," or, "it is to go to," my wife Elizabeth, or to that effect, so as to complete the sentence.

May we do this? The will seems to me incapable of meaning unless some such words are supplied, and there would, in that event, be an intestacy, a result to be avoided, especially as the testator has affirmed in the strongest language his intention not to die intestate. If his wife is not the object of the intended devise no object has been named, and hers is the only name which has been mentioned. It must have been mentioned for some purpose,

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OSLER, J.A.

and, perhaps, looking at the whole will, we may infer that it was as the intended beneficiary, in short, that this is a necessary implication from the whole of the testator's language so far as it has gone: *Hope* v. *Potter*, 3 K. & J. 206. The case seems more like that of *Pitman* v. *Stevens*, 15 East 505, where the words of the will were: "I give * * all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I appoint P. my residuary legatee and executor," followed by gifts of certain annuities and legacies, and a recommendation to P. to let the testator's sister be interred in the testator's vault, and to be kind to another relative, and do something handsome for him at his death. It was held that the will shewed the testator's intention to make P. the residuary legatee of his real estate in fee. Nevertheless some important reasons there relied on in support of the contention that the person to whom the testator had given his real and personal estate had been sufficiently pointed out cannot be invoked here. See also *Doe d. Wickham* v. *Turner*, 2 D. & R. 398.

On the whole, while I confess I am by no means free from doubt as to the testator's wife taking anything under the will I think that for the reasons and on grounds above stated the judgment may be affirmed.

MACLENNAN, J. A.:—

I cannot entertain any doubt of the meaning of this will, that is of the meaning which the words used by the testator are fitted to convey to the mind. He first declares it to be his last will and testament, and revokes all others by him theretofore made. He then proceeds thus: "It is my will that as to all my estate, both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth, to be executrix of this my will." Now here we have a clearly expressed intention to dispose of all his property to take effect at his death.

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MACLENNAN, J.A.

The words he uses are: "it is my will." The word "will" is capable of being used, and is often used, as synonomous with "I give at my death," as thus, "I will all my property to A. B." No one would doubt the sufficiency of such words. So also the meaning of such sentences as, "he willed all his property to A. B.," or "he willed A. B. all his property," is perfectly clear, so I find it impossible to read the words used here without receiving from them the conviction that the wife is the person to whom he is willing his property. That is what the words convey to my mind. It is either that, or one must say that they convey no meaning at all, or in other words, that they are mere nonsense. It is not a case of uncertainty at all. The subject is definite and certain, and so is the object, and the sole, question is whether the gift plainly intended to be made is for the benefit of the only object which is expressed. We find an intention to give all his property to somebody. That intention is clearly expressed, not only by the words, "it is my will," but by the earlier words, "I do declare this to be my last will and testament."

There is no question about what he intends to give, and all that the mind requires to be informed of is to whom it is to be given. I think that question is distinctly and unmistakably answered. The mention of his wife's name, where it is placed in the sentence, could be for no other purpose than to indicate her as the object of his intended gift. No other purpose can be suggested, and so to hold gives effect to his declared intention of disposing of his property, while to hold anything else defeats his intention altogether. The language is elliptical, but language may be very elliptical without therefore being unintelligible. The language of children is always elliptical, so also is that of foreigners who have not learned to speak or write English well, and who are imperfectly acquainted with its structure or with its syntax. If a foreigner had expressed himself in the terms used in this will no one would have any doubt of his meaning. Decided cases help little in such cases. The question is, what sense and meaning do

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the words used convey to the mind of the reader, having regard to the context, and to the occasion and purpose on and for which they were written. I refer to the language of Lord Herschell in *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, at p. 306, which was cited at the bar; and also to *Eden* v. *Wilson*, 4 H. L. C. at p. 284; *In re Redfern, Redfern* v. *Bryning*, 6 Ch. D. 133, and *In re Harrison, Turner* v. *Hellard*, 30 Ch. D. 390, a decision of the Court of Appeal, affirming Kay, J.

I think that the judgment is right, and that the appeal should be dismissed.

HAGARTY, C. J. O.:—

I agree.

Appeal dismissed.

In re Queen's Counsel.

Constitutional Law—Appointment of Queen's Counsel.

The Lieutenant-Governor-in-Council has the right to appoint members of the Bar of Ontario to be Her Majesty's counsel, and to give such members the right of pre-audience in the Courts of the Province.

Lenoir v. *Ritchie*, 3 S. C. R. 575, has been in effect overruled by later decisions of the Judicial Committee.

Per Burton, J.A.—The Lieutenant-Governor-in-Council has the exclusive right to make such appointments.

Per Street, J.—The Governor-General-in-Council has the power to appoint Queen's counsel for Dominion Courts, and to regulate the right of pre-audience in those Courts.

Statement. Pursuant to the provisions of 53 Vict. ch. 13 (O.), the following questions were submitted to the Court of Appeal for Ontario:—

(1) Whether since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent, in the name of Her Majesty, under the Great Seal of Ontario,

(*a*) To appoint from among the members of the Bar of Ontario such persons as he deems right, to be, during pleasure, Her Majesty's Counsel for Ontario,

(*b*) To grant to any member or members of the Bar of Ontario a patent or patents of precedence in the Courts of Ontario.

(2) Whether appointments of Queen's Counsel and grants of precedence such as have been made by the Lieutenant-Governor of Ontario since the said date, are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

(3) Whether members of the Bar of Ontario from time to time appointed, or to be appointed, as aforesaid, by the Lieutenant-Governor of Ontario by letters patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's Counsel for Ontario, and members of the Bar of Ontario to whom from time to time patents of precedence in the Courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario as aforesaid, in con-

formity with the limitations of the Revised Statutes of Ontario, chapter 139, have or shall become entitled to such precedence in the Courts of Ontario as have been or may be assigned to them by such letters patent after the several persons or classes referred to in the 3rd, 5th and 7th sections of the said Revised Statute of Ontario. Statement.

(4) Whether the position as to precedence in the Courts of Ontario of the remaining members of the Bar of Ontario not comprised within the classes referred to in the said 3rd, 5th and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's Counsel for Ontario, or granting to them precedence in the Courts of Ontario, is, as between them and those holding such patents as aforesaid, subsequent to those holding such patents, and as between themselves in the order of their call to the Bar of Ontario.

(5) In case the answer to any of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the Court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions.

Argument upon these questions was heard by HAGARTY, C. J. O., BURTON, and MACLENNAN, JJ. A., and STREET, J., on the 8th and 9th of September, 1896.

Irving, Q. C., for the Attorney-General of Ontario. The appointment to the office of counsel for Her Majesty, to appear on her behalf, in the Courts of Justice, is the exercise of a Royal prerogative relating to the administration of justice. The laws of the Province of Ontario restrict the right of audience in Provincial Courts of Justice to certain duly qualified persons known as barristers-at-law; and the Lieutenant-Governor being the representative of Her Majesty for all purposes of Provincial Government, may appoint such barristers Queen's Counsel as he deems necessary, for the administration of justice. The more

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recent decisions of the Supreme Court of Canada, and of Her Majesty's Judicial Committee of the Privy Council, determine that under the B. N. A. Act the Lieutenant-Governors-in-Council are vested with all the prerogatives of the Crown which had been at any time exercised by the Governors and Lieutenant-Governors of the Provinces prior to the union, under the B. N. A. Act, so far as such powers were capable of being exercised in relation to the government of the Provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion. As the executive powers of the Lieutenant-Governor are co-extensive with the legislative powers, under section 92 of the B. N. A. Act, the right of appointment of Queen's Counsel is claimed as exerciseable under sub-section 4—establishment of Provincial offices; sub-section 13—civil rights; sub-section 14—administration of justice; and the provisions of these sub-sections support the legislative enactments on the validity of which the questions are submitted to this Court for decision. The constitution of the executive authority of each Province is implied from the fact of its existence before the union of 1867 and the continuance thereof under the B. N. A. Act, and the Lieutenant-Governor has power, *virtute officii*, to appoint Queen's Counsel without Provincial statutory authority. In Lower Canada appointments of King's Counsel were made by the Governor from 1809 to 1835, and of Queen's Counsel to 1839, and like appointments were made by the Lieutenant-Governor for Upper Canada in 1838; and these appointments were continued by the Union Act of 1840, and were, by section 47 thereof (3 & 4 Vict. ch. 35) declared to subsist; it therefore appears that such appointments had been lawfully made prior to 1840, and continued to be made until the passing of the B. N. A. Act in 1867. Then the principle on which the validity of the Provincial legislation, decided by Boyd, C., 20 O. R. 222, known as the *Executive Power Case* (*Attorney-General for Canada* v. *Attorney-General of Ontario*), and confirmed 19 A. R. 31 (8th January, 1892),

and again by Supreme Court, 23 S. C. R. 458 (13th March, 1894), settled the prerogative rights exerciseable by the Lieutenant-Governors of Provinces, and among which is the appointment of Queen's Counsel. The judgment of the Court of Appeal, 19 A. R. 31, was prior to the judgment of the Privy Council in *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, wherein it was pronounced (p. 443) that "a Lieutenant-Governor, when appointed, is as much a representative of Her Majesty, for all purposes of Provincial government as the Governor-General himself is for all purposes of Dominion government." And in view of that decision it was stated in the judgment of the Supreme Court (13th March, 1894), on the appeal in the *Executive Power Case*, that it would have been "thought that after the decision of the Privy Council in the *Maritime Bank Case*, the appeal would have been abandoned." *Lenoir* v. *Ritchie*, 3 S. C. R. 575, must be treated as overruled by the judgments of the Privy Council, and also ignored by the Supreme Court of Canada. The following enactments of the Parliament of Canada seemingly recognize the status of Queen's Counsel appointed by the Lieutenant-Governors of Provinces: 46 Vict. ch. 10, secs. 1, 4 and 5, and R. S. C. ch. 174, secs. 269, 271. Argument.

H. J. Scott, Q. C., for the Attorney-General of Canada. The effect of the Ontario legislation is to take away any rights which the holder of a patent as Queen's Counsel issued by the Governor-General since Confederation may have, and it is for this reason that the Dominion is interested in the question. It is submitted that under *Lenoir* v. *Ritchie*, 3 S. C. R. 575, the Ontario Act is *ultra vires*. Even if the reasoning in that case is in some respects inconsistent with the reasoning in other cases decided by the Judicial Committee that is no ground for refusing to follow it upon the point decided by it. The decision is express and must be given effect to. It has not been reversed, and can only be reversed by the Privy Council. The case has never been questioned in any subsequent

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judgment, and the decisions relied upon by the Province do not touch the point. But apart altogether from authority the right to appoint Queen's Counsel should be held to be exerciseable by the Governor-General. Such an appointment is a personal right belonging to the Sovereign, though as a matter of practice exercised upon the recommendation of the Lord Chancellor. It is very difficult to say what legal position a Queen's Counsel holds, it being purely a matter of the custom of the Courts. At first apparently a counsel acting in a particular matter on behalf of the Crown was given precedence; then a general retainer on behalf of the Crown was given, and the Courts apparently gave barristers having such a general retainer precedence in all business, upon the fiction that they were always engaged in the business of the Crown, but the actual legal position of Queen's counsel has never been defined. The Crown as represented by the Dominion Government has power to create Dominion Courts and has power to appear in the Provincial Courts, and it follows that it must have the power of retaining counsel to appear in those Courts. That being so, it also follows that the Crown as represented by the Dominion Government must have the power to retain standing counsel under the name of Queen's Counsel, and then, by the custom of the Courts, barristers holding such patents from the Crown must have the right of precedence and pre-audience at the Bar generally granted to such persons. Possibly as between Queen's Counsel appointed by the Province and Queen's Counsel appointed by the Dominion, the Province may determine what the relative position shall be, but at the worst the Province cannot altogether deprive Queen's Counsel appointed by the Dominion of their rights, and among their rights is the right of priority over members of the outer Bar. The effect of sub-section 13 of section 92 of the British North America Act as to property and civil rights within the Province need not be discussed. Even assuming that this is a civil right, it is submitted that the Province cannot change the law of property and civil rights in the

Province to the prejudice of the prerogative of the Crown and the Dominion. It is a fallacy to say that section 65 carries the matter any further. There was no statutory authority before Confederation to appoint Queen's Counsel. The Governor-General comes here as the representative of the Queen, and gets authority from the Queen, and his duties and prerogatives as representing the Queen cannot be affected by local legislation. Sub-sections 4 and 14 of section 92 do not cover the point. The position is an honour and not an office. It is not property and it is not a civil right, and it has nothing to do with the administration of justice or the procedure of the Courts. A Queen's Counsel, just as any other barrister, has to abide by the rules of procedure, and to submit to the regulations made for the administration of justice, but he is outside of, and no part of, the administrative machinery. Argument.

Irving, Q. C., in reply. It is inaccurate to argue that section 65 of the B. N. A. Act recognizes only the exercise of powers conferred by statutes; it has been explained and adjudged that section 9 of the B. N. A. Act, "The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen," is general and applicable to the executive authority of the Provinces or of the Dominion: *Attorney-General* v. *Mercer*, 5 S. C. R. 538; *arguendo* Blake, Q. C., at pp. 578, 579, and Ritchie, C. J., at pp. 634-636.

November 10th, 1896. HAGARTY, C. J. O.:—

The judgments of the Privy Council, especially in the case of *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A. C 437, have defined the peculiar relative positions of the Dominion and Provincial Governments. They have decided that the Lieutenant-Governor is the representative of the Queen, and not, as once contended, merely of the Governor-General. In Lord Watson's words: "A Lieutenant-Governor, when appointed, is as much the representative of Her

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Majesty for all purposes of Provincial Government as the Governor-General himself is for all purposes of Dominion Government."

Again: "So far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act."

I think the only proper conclusion to be drawn from the principles laid down in our ultimate Court of Appeal is that as the Lieutenant-Governor before the Union of the Provinces, had and exercised the power of appointing Queen's Counsel, while each Province was separately and independently governed, the same official representing the Queen under the Federation Act of 1866, has, and since his appointment has had, the right to appoint such counsel.

In 1872, the Imperial Law Officers gave their opinion that the Governor-General had the right to appoint Queen's Counsel, but that a Lieutenant-Governor appointed since the Union had no such power, but that the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel, and with respect to precedence or pre-audience in the Courts of the Provinces the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor.

In 1872 the then Lieutenant-Governor made several appointments of Queen's Counsel.

In 1873 the Ontario Act, 36 Vict. ch. 3, was passed, declaring that it was and is lawful for the Lieutenant-Governor to appoint Queen's Counsel.

For the reasons already given, I think the power to appoint was in the Lieutenant-Governor without the aid of the statute.

The statute when passed, would, if constitutional, regulate, as it professed, the mode and limit of such power.

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Under the authority placing in the charge of the Provincial Government "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts," I think such appointment within the scope of the Lieutenant-Governor's power.

I answer all the questions submitted, as I understand them, in the affirmative.

I wish to add that I must not be understood as expressing any opinion on certain matters referred to in the argument as to appointments of Queen's Counsel made, or to be made, by the Governor-General since Confederation.

BURTON, J.A.:—

It is, I think, much to be regretted that this question had not been settled by judicial decision before any appointments were made, either by the Dominion or Provincial Government. There have been so many appointments now made by both governments that the subject has ceased to be a matter of much public interest, although perhaps at any time it would not have been one in which any great interest would have been taken by the public, and had the question been one merely involving pre-audience in the Courts, it would, perhaps, be of too trifling importance to warrant its discussion at this late day; but it has another aspect, and that a very grave one, which cannot be overlooked. By statute a Judge of a Superior Court in Ontario has the power of deputing any of Her Majesty's Counsel to perform his judicial duties, both civil and criminal, at the Assizes. Serious consequences might ensue, as, in the event of a Queen's Counsel being so deputed who did not hold his commission from the proper authority, all the proceedings would be illegal and *coram non judice*, and convictions, even in capital cases, invalidated.

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But the importance of the general question as to the respective powers of the Federal and Provincial Executives and Legislatures cannot be overrated, and it is in that view and with a view to obtaining an accurate and authoritative defining of those powers that this discussion becomes important.

It was strenuously urged by counsel that the case of *Lenoir* v. *Ritchie*, 3 S. C. R. 575, really decided all the points submitted for our consideration, and, so long as that case remained unreversed, it was binding upon this Court, and that it was our duty, therefore, to follow that decision, leaving it to some higher tribunal to overrule it.

Before considering that case and stating my reasons for holding that it is not binding upon us, it may be well to refer to the origin of the Provincial legislation mentioned in the case submitted.

In January, 1872, the Dominion Government, without any communication with the Government of Ontario, submitted an *ex parte* case to the Secretary of State for the Colonies, in order to obtain the opinion of the law officers of the Crown in England as to the right of the Governor-General or the Lieutenant-Governor to appoint Queen's Counsel.

That opinion, thus obtained, was adverse to the right of Lieutenant-Governors to make such appointments since the Confederation Act, but the same opinion proceeded to state that the Legislature of a Province could confer by statute upon the Lieutenant-Governor power to appoint Queen's Counsel, and of settling the practice as to precedence or pre-audience in the Courts of the Province.

The Provincial Government accordingly passed the Acts in question, which were not vetoed, but, on the contrary, approved of by the Dominion authorities, and no question was apparently raised as to their validity or construction until Mr. Ritchie raised the question of precedence as between him and Mr. Lenoir under a similar Act of Parliament in Nova Scotia; Mr. Lenoir, appointed by the Pro-

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vince, claiming precedence over Mr. Ritchie, who had previously been appointed by the Dominion Government.

When the case was before the Court in Nova Scotia, all the five Judges constituting that Court held the enactment valid, but four of them held that it was not intended to disturb the precedence of Queen's Counsel appointed before the Act, and upon this point the appeal was taken to the Supreme Court of Canada.

Counsel appears to have been taken by surprise at the *ultra vires* question being raised in the Supreme Court, and said he did not come prepared to argue it and did not profess to do so.

In that Court the Chief Justice took no part. Mr. Justice Fournier thought the case not appealable. Mr. Justice Strong and Mr. Justice Taschereau deemed it unnecessary to express any opinion on the validity of the Act, and all three were of opinion that the Act was not retrospective; and that as Mr. Ritchie's commission was granted before the Act, it could not be affected by the subsequent appointment under the Act; but three of the learned Judges, Henry, Taschereau and Gwynne, did unquestionably hold that the power of appointing was a part of the royal prerogative, which could only be exercised by the Queen herself, or by the Governor-General as her representative, and that the Provincial Act was *ultra vires* so far as it affected the rank and precedence of Mr. Ritchie. This left the question in a very unsatisfactory state, but as regards those judgments which proceeded on the ground that the prerogative could only be exercised by the Governor-General that view may be considered as completely overruled by the Judicial Committee of the Privy Council in *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, decided in July, 1892. In this state of things, we have no option in my opinion, but to state our own views notwithstanding the decision in *Lenoir* v. *Ritchie*, 3 S. C. R. 575.

In January of that year, I ventured to express my opinion in *Attorney-General for Canada* v. *Attorney-Gen-*

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eral of Ontario, 19 A. R. 31, at p. 38, in these words: "I do not agree with the construction placed upon the Confederation Act by the learned counsel for the appellant, as I have always been of opinion that the legislative and executive powers granted to the Provinces were intended to be co-extensive, and that the Lieutenant-Governor became entitled *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which Provincial Legislatures have jurisdiction; that he had in fact delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the Provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion."

This opinion seems to have been fully sustained and confirmed by the subsequent decision of the Judicial Committee, to which I have referred.

Lord Watson, in delivering the judgment, refers to the Confederation Act as nowhere professing to curtail in any respect the rights and privileges of the Crown or to disturb the relations then subsisting between the Sovereign and the Provinces; the object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest—each Province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the Provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces, so that the Dominion should be vested with such of these powers, properties and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of Provincial Government. And in a subsequent part of the judgment, he

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adds: "And a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of Provincial Government as the Governor-General himself is for all purposes of Dominion Government."

Before the Act of 1867, each Provincial Governor exercised the prerogatives of the Crown, and they are reserved to them by the Act.

It was further urged by Mr. Scott, who argued the case for the Dominion with his usual ability, that the prerogative right in this case was one inherent in the Sovereign herself, which she alone, and without advice or consent, might exercise how and when she pleases, but I apprehend that that argument was advanced simply because it had been relied on by the Government of the Dominion in its discussion of the question, and not because he himself had much confidence in it. It is, perhaps, sufficient to say that such a contention is somewhat inconsistent with the view that it had been delegated to the Governor-General, and that so far as the prerogative affects Canada, it must be regarded as a trust for the benefit of the people of Canada, to be exercised on the advice of the constitutional advisers of His Excellency the Governor-General or of the Lieutenant-Governor, as the nature of the case may require. I need not, I think, elaborate the question as to the power of the Legislature to deal with the matter as coming within section 92 of the Confederation Act. I refer particularly to sub-sections 4, 13 and 14.

The first of these gives to the Provincial Legislature exclusive jurisdiction to make laws respecting the establishment and tenure of Provincial offices, and the appointment and payment of Provincial officers, and it has been held that although the appointments of sheriffs and justices of the peace were made by the Crown as part of the prerogative, the right to make them in this Province rests with the Executive.

Sub-section 13 gives exclusive power to deal with civil rights, one of which is manifestly the right of precedence and pre-audience in the Courts.

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Sub-section 14 is also very wide, giving to the local Legislature exclusive jurisdiction to make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, all of which would be apart from the statute, matter of royal prerogative.

These powers, if they do not include the appointment of Queen's Counsel, are of infinitely more importance than the mere appointment of such an officer, and should, I think, be presumed to include the less.

It would seem to fall within one or other of the sub-sections I have quoted, and the powers of the Dominion Parliament are limited to subjects not assigned to the Provincial Legislature.

If there exists any doubt of its falling within these sub-sections, then I incline to the view that it falls within sub-section 16, as being a matter of a merely local or private nature in the Province.

The question is, to my mind, concluded by the decision in the Privy Council, and I answer the questions as follows:—

1. I am of opinion that since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario, by letters patent under the Great Seal in Her Majesty's name, to appoint from among the members of the Bar of Ontario such persons as he deems right to be Her Majesty's Counsel for Ontario, or to grant to any such member or members a patent or patents of precedence in the Courts of Ontario, and

2. That all such appointments and grants as have been made are valid and effectual.

I answer questions 3 and 4 in the affirmative, and in answer to question 5 I may add that in my opinion, from the reasons given, it follows that such right of appointment in the Courts of this Province is vested exclusively in the Lieutenant-Governor of Ontario.

MACLENNAN, J. A.:— Judgment.

MACLENNAN J.A.

This case was stated for the opinion of the Court on the 20th of April, 1892, but was not argued until the 8th of September last, because until then no counsel appeared to contest the validity of the appointments in question. It has now been argued before us by counsel on behalf of the Dominion and Provincial Governments, respectively.

The questions for the opinion of the Court, depend on the validity of the Provincial Statutes, 36 Vict. cc. 3 and 4, now embodied in R. S. O. (1887) ch. 146, entitled an Act respecting Barristers-at-Law.

On the 2nd of July, 1892, after the case had been stated, the case of *Liquidators of the Maritime Bank* v. *Receiver General of New Brunswick*, was decided in the Privy Council, [1892] A. C. 437, affirming the same case in the Supreme Court of Canada, 20 S. C. R. 695. That judgment determined conclusively that the Crown stands in the same relation to the several Provinces of the Dominion as to the Dominion itself, with respect to powers of legislation and government; and that Her Majesty is a part of the Government of the Provinces in the same sense as she is part of the Government of the Dominion. That being so, it follows that those prerogatives of the Crown which properly belong or relate to the portion of legislation and government assigned to the Provinces, are to be exercised by the respective Lieutenant-Governors as representing Her Majesty, precisely as those belonging to the Dominion are to be exercised by the Governor-General. In short the effect of the British North America Act is to distribute prerogative powers as well as powers of legislation between the Dominion and the Provinces.

I am of opinion that this decision of the Supreme Court, affirmed as it has been by the ultimate Appellate Court, and the reasons assigned therefor in both Courts, oblige us to answer the questions submitted to us in the affirmative, notwithstanding the previous decision in the case of

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Lenoir v. *Ritchie*, 3 S. C. R. 575, which was relied upon by Mr. Scott. That case certainly involved the same question as the present, and if it had remained unshaken by the Judicial Committee, we should be obliged to follow it. I think, however, that the ground upon which it was rested by a majority of the Court, has now been declared untenable, and that we can no longer regard the case as an authority binding upon us; but that we are bound to apply and follow the decision and the reasons of the higher Court. *Lenoir* v. *Ritchie*, was decided by a bench of five Judges, of whom three only concurred in a reason for judgment affecting the present case. That reason was, as expressed in the headnote of the case: "That the British North America Act has not invested the Legislatures of the Provinces with any control over the appointment of Queen's Counsel, and as Her Majesty forms no part of the Provincial Legislatures as she does of the Dominion Parliament, no Act of any such local Legislature can in any manner impair or affect her prerogative right to appoint Queen's Counsel in Canada, directly or through her representative the Governor-General, or vest such prerogative right in the Lieutenant-Governors of the Provinces."

A perusal of the judgments of those learned Judges, I think, shews that their decision rested on a view of the relation of the Crown to the Provinces which the Judicial Committee has decided to be erroneous. At p. 622, Mr. Justice Taschereau says: "Her Majesty does not form a constituent part of the Provincial Legislatures, and the Lieutenant-Governors do not sanction their bills in Her Majesty's name." At p. 634, Mr. Justice Gwynne in like manner, says: "The Queen forms no part of the Provincial Legislatures as she does of the Dominion Parliament. The Provincial Legislatures consist in some Provinces of such subordinate executive officer, and of a Legislative Assembly; and in others of such executive officer, and of a Legislative Council and Assembly." And at p. 635, he says: "Nothing can be plainer, as it seems to me, than that the several Provinces are subordinated to the Dominion Gov-

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ernment, and that the Queen is no party to the laws made by those Local Legislatures, and that no Act of any of such Legislatures can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers, which she continues to enjoy untrammelled, except in so far as we are obliged to hold that, by the express terms of the British North America Act, or by irresistible inference from what is there expressed, she has, by that Act, consented to being divested of any part of such prerogative." Although not indicated with the same clearness, it is evident that Mr. Justice Henry rested his judgment on the same ground, that the appointments in question were an exercise of the royal prerogative, and to be exercised by the Sovereign through the Governor-General only.

The view of the relation of the Crown to the Provinces, expressed in those reasons, can now no longer be upheld. In the *Maritime Bank* case, at p. 441, Lord Watson, delivering the opinion of their Lordships, says: "The object of the Act (of Confederation) was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the Provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of Provincial Government. But, in so far as regards those matters which, by section 92, are specially reserved for Provincial legislation, the legislation of each Province continues to be free from the control of the Dominion, and as supreme as it

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was before the passing of the Act." He then quotes the well known passage from *Hodge* v. *The Queen*, 9 App. Cas. 117, declaring that within the assigned limits of subject and area, the local Legislatures are supreme, and have the same authority as the Imperial Parliament or the Parliament of the Dominion. He then deals with the relation of the Crown to the Provinces, and declares (p. 443) that "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of Provincial Government as the Governor-General himself is for all purposes of Dominion Government."

Such being the executive and legislative powers of the Provinces, if this matter of the appointment of Queen's Counsel is a Provincial matter, I think it follows that it can be dealt with by the Government and Legislature of the Province. In my judgment it is a Provincial matter. In *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 631, Mr. Justice Gwynne described the nature of the office in question as follows: "It was not disputed, as indeed it could not be, that the right to appoint Queen's Counsel is a branch of the royal prerogative, that it (equally with the power to grant letters patent of precedence, to make sergeants-at-law, judges, knights, baronets, and other superior titles of dignity and honour) flows from the fountain of honour which has its seat and source in the person of royalty. In England, in point of form, a Queen's Counsel is the standing counsel of the Queen, retained by her to be of her counsel in all matters in which she may require his services. Substantially, the title is one of honour and professional rank, conferring precedence upon the person invested with the honour. Though, in point of fact, the recipients of this honour are nominated and selected by the Chancellor for the time being, yet, in point of form, the Queen's pleasure is taken upon their appointment.

"In the Colonies the appointments were made sometimes, I believe, under the royal sign-manual, but more usually by letters patent under the Great Seal of the

particular Province of whose bar the recipient is a member, signed by Her Majesty's representative within the Province in virtue of the authority vested in him by his commission appointing him Her Majesty's representative, and in pursuance of royal instructions from time to time given to him, governing him in the execution of the powers vested in him in respect of matters in which the royal prerogative is concerned.

"An Act of Parliament passed by the old Legislatures of the respective Provinces which now constitute the Confederated Provinces of the Dominion of Canada, under the constitutions which they had before Confederation, of which Legislatures Her Majesty was an integral part, as she is of the Imperial Parliament, upon being assented to by the Crown, was competent to divest Her Majesty of the right to exercise within the Province any portion of her royal prerogative."

Now, whether we regard the appointment as a retainer by the Queen of a standing counsel to be of counsel for Her Majesty in all matters in which she may require his services; or whether we regard it as a mark of honour and professional rank, conferring precedence upon the person invested with the honour, inasmuch as Her Majesty is a part of the Provincial Government, she must have power, as part of such government, to make the appointment through the Lieutenant-Governor, and the Legislature must have power, with her assent, to legislate on the subject. The questions submitted to us do not involve the right of the Dominion Government to make appointments, and I express no opinion on that right, but to my mind the right and power of the Provincial Government and Legislature are clear. If the appointment be regarded as a general retainer, as it was for a long time, and as I think it still is in England, the Provincial Government must have the right and power to make it, for that Government, in the conduct of its affairs, and particularly in the administration of the criminal law, has constant occasion to employ counsel; and if it be regarded as a title of

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honour and professional rank, the same conclusion follows. The ordinary civil and criminal courts are provincial; legal education is provincial; the Bar is provincial. The selection of Queen's Counsel is made from the Bar, a class which is provincial. During the union of Upper and Lower Canada, before Confederation, the appointments were provincial, and were expressed to be for Upper or Lower Canada, according to the Bar of which the appointee was a member. If the appointment be a mark of distinction for eminence in the profession of the law, and at the Bar, then, inasmuch as each Province has its own system of laws, and its own class of men learned in those laws, and qualified and authorized to act as counsel, it is surely the Provincial Government which is best qualified in every case to say who those members of their respective Bars may be, who by their learning and ability, and by their professional eminence, are most entitled to the distinction of being appointed Queen's Counsel.

I think when it is established that the Queen is a part of the Provincial Government, all doubt whatever of the right and power of the Government and Legislature of the Province in this matter is removed.

I think it comes distinctly within sub-sections 4, 13 and 14 of section 92 of the British North America Act. I think it is and always has been a Provincial office, confined in all its functions within the same territorial limits as the office of barrister. The Queen's Counsel, indeed, is merely a superior kind of barrister; and if as a barrister he is a provincial officer, which cannot be disputed, it is not easy to see how when he is merely promoted to a higher rank or grade in his profession, he is not still a provincial officer.

I do not say there may not be Dominion Queen's Counsel. There are Dominion Courts, and Parliament can determine who shall act as counsel in such Courts. This has been done by the Supreme and Exchequer Courts Act, R. S. C. ch. 135, sub-sections 16 and 18, and the Maritime Court

Act, R. S. C. ch. 137, section 11. The effect of these Acts is to make all Provincial barristers Dominion barristers as well, for the limited purpose of conducting business in the Dominion Courts.

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Then I think the office is a civil right in the Province. It is a civil right undoubtedly; and inasmuch as its exercise is confined within the provincial limits, and as the office has no significance or force whatever outside the Province, it comes, as it seems to me, literally within sub-section 13.

I think also it comes within sub-section 14. The office has no meaning whatever except as it relates to the administration of justice, and the constitution and organisation of the Courts of the Province, and the procedure therein. The right of audience and pre-audience in the Courts of the Province is unquestionably a matter for the Government or Legislature of the Province alone to regulate, and being involved in the appointment of Queen's Counsel, must equally be of provincial jurisdiction. It is said that inasmuch as the appointment of the Judges of Provincial Courts is a Dominion matter, and as Queen's Counsel have long been eligible to be called upon in emergency to act as Judges, the Provinces can have no authority. The answer to that is that but for the express authority given to the Dominion Government to appoint the Judges, their appointment would also have been a matter within sub-sections 4 and 14 of section 92. The administration of justice, and the constitution, maintenance and organization of Provincial Courts both of civil and of criminal jurisdiction being expressly assigned to the Province, the Judges of those Courts and their appointment would plainly be within sub-section 4, but for the express enactment to the contrary in section 96.

If the present subject had not come expressly, as I think it does, within sub-sections 4, 13 and 14, I should have thought it would have come within sub-section 16 as a matter of a merely local nature in the Province. But it seems to

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be determined by the Judicial Committee that the function of sub-section 16 is to cover matters, in a Provincial sense local, which have been omitted from the previous enumeration: *Attorney-General of Ontario* v. *Attorney-General for Canada*, [1896] A. C. 348, at p. 365.

The result is, therefore, in my opinion, that the Provincial Government and Legislature have jurisdiction over the subject of the appointment of Queen's Counsel from among the members of the Bar of Ontario, and that we ought to give an affirmative answer to the questions in the case stated.

STREET, J.:—

I entirely concur in the view of the Chief Justice and the other members of the Court that *Lenoir* v. *Ritchie*, 3 S. C. R. 575, should no longer be looked upon as a binding authority by reason of the later decisions of the Privy Council to which they have referred, and I agree generally in the conclusions at which they have arrived.

The case submitted to us, however, states that certain members of the Bar of this Province have, since the British North America Act came into force, received patents from the Dominion Government purporting to create them Queen's Counsel with precedence in the Courts, and I think the fourth question submitted to us requires that we should determine their standing in the Provincial Courts under such patents.

The question thus raised is one which seems to me to admit of as little doubt, bearing in mind the effect of the Privy Council decisions referred to, as the other questions. Certain of Her Majesty's Courts are constituted by the authority of the Dominion Legislature under the powers committed to it by the British North America Act: certain others of Her Majesty's Courts are constituted by the authority of the Ontario Legislature under the powers committed to it by that Act: neither Legislature has the right to interfere with the procedure or practice in the

Courts constituted by the other. There is but one way to prevent the clashing, in any of these Courts, of conflicting claims to precedence, and that is to treat the patents of the Dominion as regulating precedence in the Courts of the Dominion, and the patents of the Province of Ontario as regulating precedence in the Courts of the Province. So far as the title of "Queen's Counsel" is concerned, I agree that, as the Queen is a constituent part of the Legislature of this Province, as well as of that of the Dominion, the title may be conferred by the Lieutenant-Governor, Her representative here, as well as by the Governor-General, Her representative in the Dominion.

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STREET, J.

Therefore I am of opinion that all four questions submitted should be answered in the affirmative.

[END OF VOL. XXIII.]

APPENDIX.

Cases reported in the Ontario Appeal Reports, disposed of by the Supreme Court of Canada since the publication of volume 22, up to December 31st, 1896.

ADAMSON v. ROGERS, 22 A. R. 415.—Appeal dismissed; March 24th, 1896: 26 S. C. R. 159.

BRIDGEWATER CHEESE FACTORY CO. v. MURPHY, 23 A. R. 66.—Appeal dismissed; May 21st, 1896: 26 S. C. R. 443.

CANADIAN PACIFIC R. W. CO. v. TOWNSHIP OF CHATHAM, 22 A. R. 330.—Appeal allowed; February 18th, 1896: 25 S. C. R. 608.

CANADIAN PACIFIC R. W. CO. AND CITY OF TORONTO, 23 A. R. 250.—Appeal dismissed; December 9th, 1896.

COWAN v. ALLEN, 23 A. R. 457.—Appeal allowed; May 18th, 1896: 26 S. C. R. 292.

CRAWFORD v. BRODDY, 22 A. R. 307.—Appeal allowed; May 18th, 1896: 26 S. C. R. 345.

EASTMURE v. CANADA ACCIDENT ASSURANCE CO., 22 A. R. 408.—Appeal dismissed; March 4th, 1896: 25 S. C. R. 691.

FARWELL v. JAMESON, 23 A. R. 517.—Appeal allowed; December 9th, 1896.

HAUBNER v. MARTIN, 22 A. R. 468.—Appeal dismissed; March 24th, 1896: 26 S. C. R. 142.

HOOFSTETTER v. ROOKER, 22 A. R. 175.—Appeal dismissed; February 18th, 1896: 26 S. C. R. 41.

LAND SECURITY CO. v. WILSON, 22 A. R. 151.—Appeal dismissed; March 24th, 1896: 26 S. C. R. 149.

LONG v. CARTER, 23 A. R. 121.—Appeal dismissed; June 6th, 1896: 26 S. C. R. 430.

MANLEY v. LONDON LOAN CO., 23 A. R. 139.—Appeal dismissed; May 20th, 1896: 26 S. C. R. 443.

MOLSONS BANK v. COOPER, 23 A. R. 146.—Appeal allowed; December 9th, 1896.

NIAGARA DISTRICT FRUIT GROWERS' STOCK CO. v. WALKER, 23 A. R. 681.—Appeal allowed; December 9th, 1896.

PAVEY v. DAVIDSON, 23 A. R. 9.—Appeal allowed; June 6th, 1896: *sub nom.* PURDOM v. PAVEY, 26 S. C. R. 412.

RAY v. ISBISTER, 22 A. R. 12.—Appeal and cross-appeal dismissed; February 18th, 1896: 26 S. C. R. 79.

STEPHENS v. BOISSEAU, 23 A. R. 230.—Appeal dismissed; June 6th, 1896: 26 S. C. R. 437.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME.

BEING DECISIONS IN THE

COURT OF APPEAL FOR ONTARIO.

ABANDONMENT OF CORPORATE POWERS.

See COVENANT.

ACCOUNT.

See BANKRUPTCY AND INSOLVENCY, 2—COLLATERAL SECURITY.

ACTION.

Fraudulent Conveyance — Mortgage of Foreign Land.]—Where all parties reside in this Province an action can be maintained here by a creditor to have it declared that a mortgage of foreign land, containing the usual covenant for payment, was taken in the name of the mortgagee instead of the debtor, in order to defraud creditors, and that the mortgagee was a trustee for the debtor of the moneys secured by the mortgage.

Judgment of ARMOUR, C. J., reversed, OSLER, J. A., dissenting. *Pavey* v. *Davidson*, 9.

ADMINISTRATION.

See WILL, 2.

ARBITRATOR.

See ARBITRATION AND AWARD.

ARBITRATION AND AWARD.

1. *Arbitrator's Fees—Penalty — R. S. O. ch. 53, sec. 29.*]—An arbitrator is not brought within the punitive provisions of section 29 R. S. O. ch. 53, when the payment of the alleged excessive fees is made by cheque to an agent who has authority to accept money only, and the arbitrator refuses to take the cheque.

Per OSLER, J. A.—In order to fix an arbitrator with the penalty there must after the expiration of the time named be either a demand upon him to make, execute, and deliver the award and a refusal to do so unless a larger sum is paid for fees than is permitted by the Act; or actual payment of such larger sum.

Per MACLENNAN, J. A.—The person desiring to take up the award may either have the fees taxed and then tender the amount, or he may pay the amount demanded and bring action for the penalty, which is a sum equal to treble the excess demanded and not equal to treble the whole amount of the fees demanded.

Judgment of the Common Pleas Division, 25 O. R. 444, affirmed. *Jones* v. *Godson*, 34.

2. *Revocation of Submission — Rejection of Evidence—Rentals of Adjacent Properties.*]— It is not sufficient ground for the revocation of a submission to arbitration to fix the renewal ground rental of a block of land bounded by streets that the arbitrators decline to receive evidence of the gross and net rentals derived from properties on the other side of one of the streets.

Judgment of MEREDITH, J., affirmed, MACLENNAN, J. A., dissenting. *In re Small and St. Lawrence Foundry Company*, 543.

ARREST.

See MALICIOUS PROSECUTION.

ASSESSMENT AND TAXES.

Toronto Gas Company—Mains and Pipes.]—The mains and pipes of the Consumers' Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.).

Toronto Street R. W. Co. v. *Fleming*, 37 U. C. R. 116, considered.

Judgment of BOYD, C., 26 O. R. 722, affirmed, OSLER, J. A., dissenting. *Consumers' Gas Company of Toronto* v. *City of Toronto*, 551.

See LANDLORD AND TENANT, 3.

ASSIGNMENT OF MORTGAGE.

See MORTGAGE.

ASSIGNMENTS AND PREFERENCES

See BANKRUPTCY AND INSOLVENCY —PRINCIPAL AND AGENT, 1.

BANKRUPTCY AND INSOLVENCY.

1. *Assignments and Preferences—Action by Creditor in Assignee's Name—R. S. O. ch. 124, sec. 7.*]—If a preferential security is successfully attacked by a creditor suing on his own behalf under an order of the Court in the name of the assignee he can recover no more than his own claim and costs.

A creditor cannot after obtaining such an order increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to take part in the proposed proceedings.

The rights of a creditor suing in the assignee's name are not affected by acts done before action by the assignee in his personal capacity.

Judgment of STREET, J., varied. *MacTavish* v. *Rogers*, 17.

2. *Assignments and Preferences—Assignment of Book Debts—Account —R. S. O. ch. 124, sec. 8.*]—When an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected by him under the preferential security before the attack upon it.

Judgment of the Common Pleas Division affirmed. *Meharg* v. *Lumbers*, 51.

3. *Assignments and Preferences —Surplus Proceeds of Sale of Mortgaged Goods.*]—The application by a chattel mortgagee of the surplus

proceeds of sale of the goods in the mortgage in satisfaction of an unsecured debt due by the mortgagor to him, is not a preference within the meaning of the Assignments Act.

Judgment of MEREDITH, J., reversed. *Stephens* v. *Boisseau*, 230.

4. *Assignments and Preferences —Payment of Money to Creditor— R. S. O. ch. 124, sec 3.*]—Endorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of section 3 of R. S. O. ch. 124.

Armstrong v. *Hemstreet*, 22 O. R. 336, overruled.

Judgment of the Common Pleas Division reversed, OSLER, J. A., dissenting. *Davidson* v. *Fraser*, 439.

5. *Assignments and Preferences— Assignment for the Benefit of Creditors—Claim for Damages—Contestation of Claim—R. S. O. ch. 124— Practice — Form of Judgment.*]—A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Assignments and Preferences Act, R. S. O. ch. 124, and cannot, after the assignment, bring an action to ascertain the damages and rank for the amount against the estate in the hands of the assignee.

Per MEREDITH, J., at the trial.—A creditor is confined, in an action to establish his contested claim, to the quantum and items set out in the affidavit of claim filed with the assignee.

Proper form of judgment in an action establishing a right to rank on the estate of an insolvent explained. *Grant* v. *West*, 533.

See Gurofski v. *Harris*, 717—LANDLORD AND TENANT, 2—PRINCIPAL AND AGENT, 1.

BANKS.

See COLLATERAL SECURITY—COMPANY, 1.

BILLS OF EXCHANGE.

See CHOSE IN ACTION, 1—COMPANY.

BOND.

See PRINCIPAL AND SURETY.

BOOK DEBTS.

See BANKRUPTCY AND INSOLVENCY, 2.

BUILDING LOAN.

See Pierce v. *Canada Permanent Loan and Savings Company*, 516.

CARRIERS.

See RAILWAYS.

CASES.

Anderson v. *Wilson*, 25 O. R. 91, considered.]—*See* MALICIOUS PROSECUTION.

Armstrong v. *Hemstreet*, 22 O. R. 336, overruled.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

Brice v. *Bannister*, 3 Q. B. D. 569, distinguished.]—*See* CHOSE IN ACTION, 1.

Bristol and West of England Land Co. v. *Taylor*, 24 O. R. 286, distinguished.]—*See* MORTGAGE, 2.

Re Ford, Patten v. *Sparks*, 72 L. T. N. S. 5, applied.]—*See* WILL, 1.

Frost v. *Knight*, L. R. 7 Ex. 111, considered.] — *See* LANDLORD AND TENANT.

Harris v. *Truman*, 9 Q. B. D. 264, applied.] — *See* PRINCIPAL AND AGENT, 1.

Hochster v. *De la Tour*, 2 E. & B. 678, considered.] — *See* LANDLORD AND TENANT.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, approved.]—*See* DEFAMATION, 2.

Lenoir v. *Ritchie*, 3 S. C. R. 575, considered.] — *See* CONSTITUTIONAL LAW.

Mykel v. *Doyle*, 45 U. C. R. 65, considered.]—*See* EASEMENT.

Sinden v. *Brown*, 17 A. R. 173, approved and followed.]—*See* JUSTICE OF THE PEACE.

Smith v. *Evans*, 13 C. P. 60, referred to.]—*See* MALICIOUS PROSECUTION.

South Hetton Coal Co. v. *North-Eastern News Association*, [1894] 1 Q. B. 133, followed.]—*See* DEFAMATION, 2.

Stephens v. *Stephens*, 24 C. P. 424, referred to.]—*See* MALICIOUS PROSECUTION.

Toronto Street R. W. Co. v. *Fleming*, 37 U. C. R. 116, considered.] *See* ASSESSMENT AND TAXES.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R 612, followed.]—*See* RAILWAYS.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, considered.]—*See* PRINCIPAL AND AGENT, 2.

CERTIFICATES.

See COMPANY, 2.

CHATTELS.

See EXECUTION.

CHOSE IN ACTION.

1. *Equitable Assignment—Building Contract—Default—Bills of Exchange and Promissory Notes.*]—The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of (plaintiff) $400 value received and charge to account of" (contractor), and the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than $400 of the contract price had yet to be earned, and the defendant put an end to the contract and completed the building, the cost being more than the contract price:—

Held, reversing the judgment of ROBERTSON, J., that the order was not a bill of exchange because the time of payment was indefinite, nor an equitable assignment because the

fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor, or some one on his behalf, and that by reason of his default no liability arose.

Brice v. *Bannister*, 3 Q. B. D. 569, distinguished. *Thomson* v. *Huggins*, 191.

2. *Covenant—Assignment of Covenant by one Joint Covenantee to his Co-covenantees—Mercantile Amendment Act, R. S. O. ch. 122—Mortgage—Conveyance of Equity to One of Several Joint Mortgagees.*]—One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. ch. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff, BURTON, J. A., dissenting on this point.

A conveyance of the equity of redemption to one of several joint mortgagees, he convenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt.

Judgment of the Queen's Bench Division affirmed. *Scarlett* v. *Nattress*, 297.

3. *Collateral Security—Action by Assignor—Insurance—Fire Insurance.*]—Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party.

Where there is separate insurance in different companies in favour of mortgagee and mortgagor, the latter, in an action on the policy effected by him, is not bound by a settlement of the amount of the loss between the mortgagee and his insurers although assented to by the mortgagor.

Judgment of the Queen's Bench Division affirmed. *Prittie* v. *Connecticut Fire Insurance Company*, 449.

See INSURANCE, 2.

CHURCH.

Trust — Alteration in Constitution—Change in Doctrine—Secession of Members.]—The civil Courts will deal with questions of church doctrine and beliefs only in so far as it becomes necessary so to do to determine civil rights. Where a dispute arises as to which of two bodies represents a particular church in trust for which property has been granted a question of ecclesiastical identity arises, and those who claim that the trust has been violated must shew that their opponents have so far departed from the fundamental principles of the church in question as to be in effect no longer members thereof.

A provision that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands" is not violated by mere alterations in expression or fuller and clearer statements of doctrine.

Where the constitution of a church provides that there shall be no alteration therein "unless by request of two-thirds of the whole society," alterations initiated by the governing body and assented to at a regularly constituted general conference of the whole church and by two-thirds of those of the members who have voted thereon, all members have been asked to vote, are valid. No previous

request is necessary, nor is it necessary to have the assent of two-thirds of all the members.

Judgment of STREET, J., reversed. *Itter* v. *Howe*, 256.

COLLATERAL SECURITY.

Banks—Suspense Account—Estoppel—Creditors' Relief Act.]—A mercantile firm obtained by the discount of their own notes and by overdraft a line of credit from a bank "to be secured by collections deposited." They deposited with the bank as collateral security for the advances customers' notes to an amount nearly equal to the advances and from time to time withdrew notes that fell due and on the same terms deposited others. They suspended payment, and the bank obtained several judgments against them on such of their notes as were due and issued executions under which and other executions the sheriff realized and prepared to make a distribution under the Creditors' Relief Act. The defendants then made an application to compel the bank to credit on the judgments moneys collected upon the customers' notes, and an issue was directed, in which it was held that the bank was entitled by virtue of the agreement entered into to hold these moneys in suspense as security against any ultimate loss, and was, therefore, not bound to give credit. Subsequently the bank brought an action on other notes that had matured, having at the time a larger sum in the suspense account than the amount for which action was brought, but less than the total amount of its claim. At this time the sheriff expected to pay a further dividend under the Creditors' Relief Act:—

Held, per HAGARTY, C. J. O., and BURTON, J. A., that the bank was entitled to judgment for the full amount sued for, and was not bound to appropriate the moneys collected to that particular portion of the debt:—

Held, also, *per* HAGARTY, C. J. O., and OSLER, J. A., that at all events the judgment in the issue was conclusive upon this question.

In the result the judgment of the Queen's Bench Division, 26 O. R. 575, was reversed, MACLENNAN, J. A., dissenting. *Molsons Bank* v. *Cooper*, 146.

See CHOSE IN ACTION, 2.

COMPANY.

1. *Banks—Bills of Exchange and Promissory Notes — Discount by President—Payment to Creditors of Company—Right to Debit Company's Account.*]—Where the president of an incorporated company made a promissory note in the company's name without authority and discounted it with the company's bankers, the proceeds being credited to the company's account, and paid out by cheques in the company's name to their creditors whose claims should have been paid by him out of moneys which he had previously misappropriated, the bankers, who took in good faith, were held entitled to charge the amount of the note, when it fell due, against the company's account.

Judgment of the Chancery Division, 23 O. R. 327, affirmed, BURTON, J. A., dissenting. *The Bridgewater Cheese Factory Company* v. *Murphy*, 66.

2. *Share Certificates—Estoppel—R. S. O. ch. 157, sec. 52.*]—A company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered, and contained the words "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment endorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate:—

Held, that the transfer to the plaintiff, in view of the provisions of section 52 of the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, conferred upon him a mere equitable title which was cut out by the subsequent transfer, and that while the company might have insisted upon production of the certificate they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares.

Judgment of MACMAHON, J., reversed, HAGARTY, C. J. O., dissenting. *Smith* v. *The Walkerville Malleable Iron Company*, 95.

3. *Winding-up — Action against Shareholder by Creditor of Company —R. S. C. ch. 129—R. S. O. ch. 157, sec. 61.*]—After a winding-up order has been made under R. S. C. ch. 129, a judgment creditor of the company cannot bring an action under section 61 of R. S. O. ch. 157, against a contributory, for payment of the amount unpaid on his shares.

Judgment of the Queen's Bench Division, 27 O. R. 131, reversed. *Shaver* v. *Cotton*, 426.

See COVENANT—DEFAMATION, 2.

CONSTITUTIONAL LAW.

Appointment of Queen's Counsel.]—The Lieutenant-Governor-in-Council has the right to appoint members of the Bar of Ontario to be Her Majesty's counsel, and to give such members the right of pre-audience in the Courts of the Province.

Lenoir v. *Ritchie*, 3 S. C. R. 575, has been in effect overruled by later decisions of the Judicial Committee.

Per BURTON, J.A.—The Lieutenant-Governor-in-Council has the exclusive right to make such appointments.

Per STREET, J.—The Governor-General-in-Council has the power to appoint Queen's counsel for Dominion Courts, and to regulate the right of pre-audience in those Courts. *In re Queen's Counsel*, 792.

CONTRACT.

See CHOSE IN ACTION—LANDLORD AND TENANT, 1.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

COPYRIGHT.

See Frowde v. *Parrish*, 728.

CORROBORATION.

See EVIDENCE, 1.

COVENANT.

Restraint of Trade—Company—Abandonment of Corporate Powers—Covenant between Intending Shareholders—Right of Shareholders to Enforce after Incorporation—Practice — Injunction — Damages.]—A mutual covenant with each other by persons engaged in the same trade throughout Canada, not to carry on a certain branch of that trade for twenty years, or for such shorter time as an incorporated company which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, is good.

Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant.

Breach of such a covenant may be restrained by injunction in an action by one or more of the other parties thereto though no actual damage is proved to have resulted from the breach.

An agreement by a company, incorporated under the Dominion Joint Stock Companies Letters Patent Act for the purpose of manufacturing, importing and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, etc., etc., for the sale of its stock of plate glass to a company to be formed with a covenant not to compete in the plate glass business with that company for twenty years is valid and is not an *ultra vires* abandonment of its powers.

One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenanting not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company, HAGARTY, C.J.O., dissenting on this point.

Judgment of MACMAHON, J., affirmed. *McCausland* v. *Hill*, 738.

See CHOSE IN ACTION, 2—LANDLORD AND TENANT, 1, 3—PARTNERSHIP.

CREDITORS' RELIEF ACT.

See COLLATERAL SECURITY.

CROWN LANDS.

Ordnance Lands—Chain Reserve along Niagara River.]—The "chain reserve" along the bank of the Niagara river, and the slope between the top of the bank and the water's edge, were not originally set apart for military or ordnance purposes, and on Confederation did not pass to the Dominion Government as "Ordnance Lands," but remained part of the public domain of the Province of Ontario.

Judgment of BOYD, C., 23 O. R. 1, affirmed. *The Commissioners for the Queen Victoria Niagara Falls Park* v. *Howard*, 355.

DAMAGES.

See BANKRUPTCY AND INSOLVENCY, 5 — COVENANT — DEFAMATION, 2 — LANDLORD AND TENANT, 1—MALICIOUS PROSECUTION.

DEFAMATION.

1. *Slander—Privilege—Malice—Post-office Inspector—Notice of Action.*]—A statement by a post-office inspector when investigating complaints as to lost letters, to the sureties of the post-master, that the post-master's wife has stolen the letters in question and has given him a written confession of her guilt, is *primâ facie* privileged, because of the financial interest of the sureties in the investigation.

Semble: Such a statement to a partner of one of the sureties is not protected.

The facts that the plantiff at the trial denies having stolen the letters and having made any confession, and that the inspector does not produce the alleged confession, or in any way account for it, is some evidence that he made the accusation knowing it to be untrue, and therefore maliciously, so as to displace the *primâ facie* case of privilege.

A post-office inspector is not entitled to notice of an action to recover damages for defamatory statements made by him.

Judgment of the Common Pleas Division, 26 O. R. 528, affirmed, OSLER, J. A., dissenting as to three of the statements in question on the ground that the inference of malice was rebutted by the plaintiff's own evidence. *Hanes* v. *Burnham*, 90.

2. *Libel—Incorporated Company—Damages—Evidence—Miscarriage—Con. Rule 791—New Trial—Estoppel.*]—An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business.

South Hetton Coal Co. v. *North Eastern News Association*, [1894] 1 Q. B. 133, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, approved.

If the judgment of a Divisional Court directing a new trial is not appealed against the questions determined by it cannot be reopened upon an appeal from the judgment at the second trial.

It is proper to ask witnesses in a libel action who, in their opinion, is aimed at by the libel in question.

It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiffs' business, but the Court refused to interfere because of the admission of the opinion of one witness, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages and the damages allowed were small.

Judgment of the Queen's Bench Division affirmed. *Journal Printing Company* v. *MacLean*, 324.

DISCHARGE.

See LIMITATION OF ACTIONS.

DISTRESS.

See LANDLORD AND TENANT, 4.

DOWER.

See WILL, 2

DRAINAGE.

See Broughton v. *Township of Grey*, 601.

EASEMENT.

Abandonment — Sale of Land — Sale by Plan—Lane not in Use.]—Abandoment of an easement may be shewn not only from acts done by the owner of the dominant tenement indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement.

Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was held that the owner of the dominant tenement could not then have the right of way opened.

Mykel v. *Doyle*, 45 U. C. R. 65, considered.

Per MACLENNAN, J. A. A conveyance made in pursuance of the Short Forms Act, of a lot according to a registered plan upon which a lane is laid out does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question.

Judgment of ROBERTSON, J., reversed. *Bell* v. *Golding*, 485.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION, 1.

EQUITY OF REDEMPTION.

See MORTGAGE.

ESTOPPEL.

See COLLATERAL SECURITY—COMPANY, 2—DEFAMATION, 2—INFANT.

EVIDENCE.

1. *Corroboration—Executors and Administrators—Action by Administratrix.*]—The "material evidence" in corroboration, required by the Evidence Act, R. S. O. ch. 61, in an action by or against the heirs, executors, administrators or assigns of a deceased person, may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement.

In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the moneys in question were paid in due course to the deceased is sufficiently corroborated by shewing that the deceased, a close, careful, intelligent man, who lived for over a year after the transactions in question, and during that time saw and conversed with many persons, continued to entrust her with his business, and made no complaint of the non-receipt of the money.

Judgment of ARMOUR, C. J., affirmed. *Green* v. *McLeod*, 676.

2. *Will—Letters Probate—Testamentary Capacity.*]—Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only *primâ facie* evidence as far as real estate

is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity.

Judgment of the Common Pleas Division affirmed. *Sproule* v. *Watson*, 692.

See ARBITRATION, 2 — DEFAMATION, 2.

EXECUTION.

Exemptions — Chattel Ordinarily Used in the Debtor's Occupation.]— Tools and implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used.

An execution creditor was held entitled, therefore, to garnish the price of a baker's waggon sold by the execution debtor a few days after he had abandoned the occupation of baker and had entered upon the occupation of laundryman.

Judgment of the First Division Court of Grey reversed. *Wright* v. *Hollingshead*, 1.

EXECUTORS AND ADMINISTRATORS.

See EVIDENCE, 1.

EXECUTORY DEVISE.

See WILL, 2.

EXEMPTIONS.

See EXECUTION.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

See LANDLORD AND TENANT, 2.

FOREIGN LAND.

See ACTION.

FORFEITURE.

See LANDLORD AND TENANT, 2.

FRAUDULENT CONVEYANCE.

Voluntary Conveyance—Grantor's Intention to Embark in Business.]— A voluntary conveyance of part of his estate by a retired and successful hotel-keeper to his wife, made at a time when he was in solvent circumstances but was, after some months of idleness, about to take up the hotel-keeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss by fire.

Judgment of the Divisional Court reversed. *Fleming* v. *Edwards*, 718.

See Gurofski v. *Harris*, 717— ACTION.

GUARANTY AND INDEMNITY.

See PRINCIPAL AND SURETY.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 4.

HUSBAND AND WIFE.

Employment in which Husband has no Proprietary Interest—R. S. O. ch. 132, sec. 5.]—"Proprietary interest" in section 5 of R. S. O. ch. 132, means "interest as an owner," or "legal right or title."

When a married woman rents a farm and employs her husband to work it, he has no "proprietary interest" in the grain raised thereon, and it is not liable to seizure by his creditors.

Judgment of the Second Division Court of Northumberland and Durham affirmed. *Cooney* v. *Sheppard*, 4.

See INFANT.

ICE.

See MUNICIPAL CORPORATIONS, 4.

INFANT.

Representation as to Age—Mortgage by Infant—Husband and Wife—Mortgage by Infant Married Woman—R. S. O. ch. 134, sec. 6.]—To make an infant liable upon a mortgage of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation.

Section 6 of R. S. O. ch. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment.

Judgment of FALCONBRIDGE, J., reversed. *Confederation Life Association* v. *Kinnear*, 497.

INJUNCTION.

See COVENANT.

INSURANCE.

1. *Fire Insurance — Variation from Statutory Conditions—Co-insurance.*]—A provision in a fire insurance policy that "the assured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her or their proportion of any loss," is a condition and not a mere direction as to the mode of ascertaining the amount of the loss, and it is void if not printed in accordance with the provisions of the Act.

Judgment of ARMOUR, C.J., affirmed. *Wanless* v. *Lancashire Ins. Co.*, 224.

2. *Fire Insurance — Assignment of Insurance before Loss.*]—The interest of the insured in a policy of insurance upon chattels may, before loss, be validly assigned by him to a person who has no interest in them at the time of the assignment, the insured remaining owner of the chattels.

Judgment of MEREDITH, C. J., affirmed. *McPhillips* v. *London Mutual Fire Ins. Co.*, 524.

3. *Fire Insurance—Change Material to the Risk.*]—A provision in a policy of fire insurance permitting the insured to use "for the purpose of threshing the crops on the premises a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain.

The use of a steam engine on one occasion in connection with a machine for crushing grain is not a change

material to the risk within the meaning of the statutory condition. That condition refers to some structural alteration in the premises or habitual or permanent alteration in the nature of the work or business carried on.

Judgment of ROBERTSON, J., affirmed. *Johnston* v. *Dominion Grange Mutual Fire Insurance Co.*, 729.

4. *Life Insurance—Payment of Premium—Agent's Authority.*]—An agent of an insurance company has no power to bind the company by giving a policy holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy holder to the company, the policy on its face providing that payment of the premium in cash to the company was necessary.

Judgment of ROSE, J., 26 O. R. 596, affirmed. *Tiernan* v. *People's Life Ins. Co.*, 342.

5. *Life Insurance — Premium Notes—Discount Thereof—Non-payment.*]—To cover the first premiums upon two policies of insurance the assured gave to the company's agent his promissory note, and the promissory note of his brother, payable to the agent's order. Each policy contained a provision that in the event of non-payment of a note given for a premium the policy should become void. The agent discounted the notes with his own bankers, and in his return to the company treated the premiums as paid, and the company took from him his own note in their favour to cover the balance due by him, which included other premiums. The notes given by the assured and his brother to the agent were not paid, and after their maturity and dishonour the assured died:—

Held, per HAGARTY, C.J.O., and BURTON, J.A., that what took place between the company and the agent was not equivalent to payment of the premiums, and that, there being no misrepresentation by the agent or misleading of the assured, his representatives could not recover.

Per OSLER and MACLENNAN, JJ.A., that by discounting the notes the agent received payment of the premiums, as between himself and the company, and the subsequent non-payment of the notes was entirely a matter between the agent and the makers.

In the result the judgment of MEREDITH, C.J., in favour of the assured's representatives, was affirmed. *Fleming* v. *London and Lancashire Life Assurance Co.*, 666.

See CHOSE IN ACTION, 3.

INTEREST.

See MORTGAGE.

JURY.

See RAILWAYS.

JUSTICE OF THE PEACE.

Felony—Issue of Warrant—Absence of Written Information—Notice of Action—Criminal Code, ss. 22, 23.] A justice of the peace, who issues his warrant for the arrest of a person charged with felony without the information having been sworn, is liable in trespass.

Sections 22 and 23 of the Criminal Code are a codification of the

Common Law, and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on suspicion, or calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant.

A notice of action alleging that the defendant on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested, and kept under arrest on a charge of arson, and on said 8th of September, maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him and to be committed for trial, and to be confined in the common gaol, is a sufficient notice of action in trespass, BURTON, J. A., expressing no opinion on this point.

Per curiam. Semble, Notice of action was necessary. *Sinden* v. *Brown*, 17 A. R. 173, approved and followed.

Per BURTON, J. A.—Notice of action is not necessary in such a case. Judgment of the Queen's Bench Division, 27 O. R. 117, affirmed. *McGuiness* v. *Dafoe*, 704.

See MALICIOUS PROSECUTION.

LANDLORD AND TENANT.

1. *Lease—Breach by Tenant—Repudiation of Contract—Damages.*]—When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot, on the principle that there has been a repudiation of the contract, at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due.

Hochster v. *De la Tour*, 2 E. & B. 678; *Frost* v. *Knight*, L. R. 7 Exch. 111, considered.

Judgment of the County Court of Middlesex reversed. *Connolly* v. *Coon*, 37.

2. *Fixtures — Short Forms of Leases Act, R. S. O. ch. 106—Forfeiture.*]—A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purposes of his business, even though they are fastened to the building, provided, however, the removal can be effected without substantial injury, and the covenant in the Short Forms of Leases Act, R. S. O. ch. 106, to leave the premises in repair, does not restrict this right.

Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed after the election to forfeit.

Judgment of the Queen's Bench Division, 26 O. R. 224, affirmed. *Argles* v. *McMath*, 44.

3. *Lease—License—Building over Lane—Covenant to Pay Taxes—Assessment and Taxes.*]—A lease made in pursuance of the Short Forms Act of specifically described premises contained a provision that

the lessee might at any time build or extend any building over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane":—

Held, per HAGARTY, C. J. O., and BURTON, J. A., affirming the judgment of MEREDITH, C. J., 26 O. R. 489, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.

Per OSLER, and MACLENNAN, JJ. A., that the right to build was part of the subject matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane:—

Held, also, however, that this was at all events a question of assessment, and that although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the Assessment Department, BURTON, J. A., expressing no opinion on this point. *Janes* v. *O'Keefe*, 129.

4. *Distress—Goods of Stranger—Person in Possession "Under or With the Assent of" the Tenant—R. S. O. ch. 143, sec. 28, sub-sec. 3.*]—The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages:—

Held, per HAGARTY, C. J. O., and OSLER, J. A., that notwithstanding the tenants' repudiation of the agents' authority, the plaintiffs were in possession "under" the tenants, within the meaning of sub-sec. 3 of R. S. O. ch. 143, sec. 28, and the distress was lawful.

Per BURTON, and MACLENNAN, JJ. A., that the right of distress is limited to cases where some privity exists and the distress was unlawful.

In the result the judgment of the Queen's Bench Division, 27 O. R. 141, dismissing the action, was affirmed. *Farwell* v. *Jameson*, 517.

5. *Lease — Mortgage of Lease—Assignee of Term.*]—A mortgage of lease, after reciting the lease, granted and mortgaged to the mortgagees (a loan company), their successors and assigns forever, the lease and the benefit of all covenants therein contained, and all that parcel of land (describing it), *habendum* unto the mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the lease, less one day thereof, and all renewals and substituted estates and right of renewal and other interests of the mortgagor:—

Held, that the premises did not grant any estate or interest, and

the *habendum* was not void as repugnant; that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent.

Judgment of ROBERTSON, J., reversed. *Jamieson* v. *London and Canadian Loan and Agency Co.*, 602.

LEASE.

See LANDLORD AND TENANT.

LIBEL.

See DEFAMATION.

LICENSE.

See LANDLORD AND TENANT, 3.

LIMITATION OF ACTIONS.

Purchase of Farm — Mortgage to Secure Purchase Money—Possession by Son of Purchaser—Payment of Mortgage—Effect of Discharge.]—In March, 1881, the plaintiffs' testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,600, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understanding that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid, he should have the farm, subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage which, the balance being made up by the father, was paid off on the 30th of March, 1886, a statutory discharge acknowledging payment by the father being on that day made and registered. The father after this declined to convey the farm to the son, and promised to leave it to him by his will, but died in 1894, leaving a will in favour of the plaintiffs. The son continued in possession of the farm until his death in 1893, and the defendants, to whom he devised his property, continued in possession after his death, this action being brought to eject them. From time to time during the lifetime of the son, the father had spent a few days at the farm, but had not actively interfered in the management:—

Held, *per* HAGARTY, C. J. O., and OSLER, J. A., that title had not been acquired as against the father and his devisees.

Per BURTON, and MACLENNAN, JJ.A. The execution and registration of the discharge gave, in any event, a new starting point for the statute.

Judgment of the Chancery Division, 27 O. R. 93, reversed. *Henderson* v. *Henderson*, 577.

LIFE INSURANCE.

See INSURANCE.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 1, 2.

MALICE.

See DEFAMATION, 1.

MALICIOUS PROSECUTION.

Arrest—Trespass—Justice of the Peace—Damages.]—A complainant who in good faith lays an information for an offence unknown to the law before a magistrate who thereupon without jurisdiction convicts and commits the accused to gaol is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution.

Smith v. *Evan*, 13 C. P. 60; *Stephens* v. *Stephens*, 24 C. P. 424, referred to.

Anderson v. *Wilson*, 25 O. R. 91, considered.

His liability in an action of trespass for such imprisonment would depend upon whether he had directly interfered in and caused the arrest, or whether the conviction and imprisonment were the acts of the magistrates alone.

There was evidence upon which the jury might have reasonably found that the complainant, before laying the information, assisted in arresting the plaintiff. The case was left to the jury, by ROBERTSON, J., as one of trespass as regarded that arrest and malicious prosecution as to the subsequent proceedings, and they found a general verdict in the plaintiff's favour for $200 damages :—

Held, HAGARTY, C. J. O., dissenting, that there must be a new trial. *Grimes* v. *Miller*, 764.

MASTER AND SERVANT.

1. *Workmen's Compensation for Injuries Act, 1892—"Superintendence"—55 Vict. ch. 30, sec. 2, subsec. 1 (O.).*]—No implied right of superintendence within the meaning of section 2 (1) of the Workmen's Compensation for Injuries Act, 1892, 55 Vict. ch. 30 (O.), arises merely from length of service or skill, and the employer is not liable where one workman, presuming on greater length of service or skill, directs his fellow workman to do certain work in an unsafe manner and injury results.

Judgment of the Chancery Division, 27 O. R. 154, reversed. *Garland* v. *City of Toronto*, 238.

2. *Workmen's Compensation for Injuries Act—Notice of Action—Notice of Objection Thereto—Pleading—55 Vict. ch. 30, sec. 14 (O.).*]—The provisions of section 14 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.), are not complied with merely by pleading that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection not less than seven days before the hearing of the action if he intends to rely upon it.

Judgment of BOYD, C., affirmed. *Cavanagh* v. *Park*, 715.

MILLS AND MILL DAM ACT.

See WATER AND WATER COURSES.

MORTGAGE.

1. *Payment of Prior Encumbrance—Interest—Assignment of Mortgage—Purchaser of Equity of Redemption.*]—When a loan is effected for the purpose of paying off encumbrances, at once or as they become due, at the option of the new mortgagees, and one of the encumbrances,

at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior incumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagee.

An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as this, charge the mortgagor with the increased rate.

The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself does not make him liable to pay that sum to the mortgagees.

Judgment of the Chancery Division affirmed. *Manley* v. *The London Loan Company*, 139.

2. *Owner of Equity of Redemption—Extension of Time for Payment—Increase in Rate of Interest—Reservation of Remedies.*] — An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected or the value of the mortgaged property impaired he cannot complain.

Bristol and West of England Land Co. v. *Taylor*, 24 O. R. 286, distinguished.

Judgment of ROBERTSON, J., reversed, OSLER, J. A., expressing no opinion. *Trust and Loan Company* v. *McKenzie*, 167.

See CHOSE IN ACTION, 2—INFANT —LANDLORD AND TENANT, 5—LIMITATION OF ACTIONS—*Pierce* v. *Canada Permanent Loan and Savings Company*, 516.

MUNICIPAL CORPORATIONS.

1. *Local Improvements — Sidewalks—55 Vict. ch. 42, sec. 623b (O.).*] —Publication of an advertisement in a newspaper having a large circulation in the municipality stating that the corporation intend to construct sidewalks in certain named districts, is not sufficient notice to a property owner affected by the proposed work.

The procedure to be observed in passing by-laws for the construction of sidewalks considered.

Judgment of STREET, J., 26 O. R. 480, affirmed. *In re Hodgins and the City of Toronto*, 80.

2. *Railway Company—Joint Special Agreement — Local Improvements.*]—A city municipality and a railway company and others, entered into an agreement for the execution of certain works, by the former, authorized by order in council under the Railway Act, the cost being apportioned between them, of which the railway company paid their share.

The agreement provided that no party to it should be entitled to compensation for injury or damages to their lands by reason of the construction or maintenance of the works, a necessary part of which was the construction of a road towards and under the railway tracks. A portion of the roadway fronted on the lands of the railway company, and the city sought to charge the railway company with the cost of the construction of the roadway as a local improvement under the Consolidated Municipal Act, 1892, and passed a by-law for that purpose :—

Held, that the work having been done under the agreement between the parties and the order in council, the local improvement clauses were not applicable and the by-law was void.

Judgment of MACMAHON, J., affirmed. *In re Canadian Pacific R. W. Co. and City of Toronto*, 250.

3. *Public Parks Act — Purchase by Park Commissioners—R. S. O. ch. 190.*]—A city adopted the Public Parks Act, R. S. O. ch. 190, and park commissioners were appointed, who entered into contracts with the defendants to purchase lands for park purposes, and made a requisition on the city for the purchase money. The city refused to recognize the contracts, and brought these actions for a declaration that they were invalid :—

Held, per HAGARTY, C. J. O., and BURTON, J. A., that the park commissioners had, in the *bonâ fide* exercise of their discretion, the right to enter into the contracts, and that the city, so long as the statutory limit was not exceeded, was bound to provide the purchase money.

Per OSLER and MACLENNAN, JJ.A., that the city council had a discretion whether or not to adopt the contracts and provide the purchase money.

In the result the judgment of ROSE, J., dismissing the actions, was affirmed. *City of Ottawa* v. *Keefer*, *386 ; City of Ottawa* v. *Clark*, *386*.

4. *Highways—Ice on Sidewalk—57 Vict. ch. 50, sec. 13 (O.).*]—A street crossing in the line of and joining parts of a sidewalk on opposite sides of the street, is not a sidewalk within the meaning of 57 Vict. ch. 50, sec. 13 (O.).

On the street crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured :—

Held, per HAGARTY, C. J. O., and MACLENNAN, J. A., that the municipality was not liable.

Per BURTON, and OSLER, JJ.A., that there was evidence of negligence to go to the jury.

In the result the judgment of the Common Pleas Division was affirmed. *Drennan* v. *City of Kingston*, 406.

See Broughton v. *Township of Grey*, *601 ; Smith* v. *Township of Ancaster*, *596*.

NEGLIGENCE.

1. *Contributory Negligence—Negligence of Driver of Carriage—Injury to Occupant.*]—The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage.

Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence the former cannot recover.

Judgment of MEREDITH, C. J., affirmed. *Flood* v. *Village of London West*, 530.

2. *Unsafe Premises—Volunteer.*]—A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in a reasonably safe condition, but one who visits them for his own purposes and without the knowledge of the occupant, does so at his own peril.

The superintendent of a coal company, before the time arranged for delivery, without the knowledge of the defendants, went to a schoolhouse to look at the coal-bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar :—

Held, reversing the judgment at the trial, that he could not recover damages. *Rogers* v. *Toronto Public School Board*, 597.

See RAILWAYS.

NOTICE OF ACTION.

See DEFAMATION, 1—JUSTICE OF THE PEACE—MASTER AND SERVANT, 2.

ORDNANCE LANDS.

See CROWN LANDS.

PARTIES.

See WILL, 2.

PARTNERSHIP.

Covenant in Firm Name.]—Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to a mortgage in favour of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgage, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgage:—

Held, affirming the judgment of ROSE, J., that this covenant bound only the partner who signed it. *Hamilton Provident and Loan Society* v. *Steinhoff*, 184.

PENALTY.

See ARBITRATION AND AWARD.

PLAN.

See EASEMENT.

PLEADING.

See MASTER AND SERVANT, 2.

PRACTICE.

See BANKRUPTCY AND INSOLVENCY, 5—COVENANT—DEFAMATION, 2—WILL, 2.

PRINCIPAL AND AGENT.

1. *Bankruptcy and Insolvency—Assignments and Preferences — Trust.*]—When an agent purchases goods for his principal with money supplied by the latter there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable against the agent's assignee for the benefit of creditors, even through the agent has, while purchasing for the principal, also purchased goods of the same kind for himself and has not set aside specific portions of the goods to answer the principal's claim.

Harris v. *Truman*, 9 Q. B. D. 264, applied.

Judgment of ROBERTSON, J., affirmed on other grounds. *Long* v. *Carter*, 121.

2. *Sale of Goods — Undisclosed Principal.*]—Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, to sell their goods at invoice prices, they are not liable for the price of goods of the same kind purchased by the agent for himself from other persons without the knowledge or authority of his employers.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, considered.

Judgment of MACMAHON, J., reversed. *Becherer* v. *Asher*, 202.

See INSURANCE, 3.

PRINCIPAL AND SURETY.

1. *Bond—Public Schools—Secretary-Treasurer.*]—A secretary-treasurer of a public school board was appointed for a year on giving the necessary security, which he did by bond with sureties, without any limit as to time or any reference to the period of his appointment. He was reappointed each year for several years in the same way and on the same condition, but without fresh security being taken, and subsequently became a defaulter in respect of moneys received by him during his last year's appointment:—

Held, that the sureties were not liable for his defalcation.

Judgment of STREET, J., affirmed. *Waterford School Trustees* v. *Clarkson*, 213.

2. *Assignment of Mortgage—New Mortgage—Reservation of Rights.*]—A covenant by the assignor of a mortgage with the assignee that the mortgage money shall be duly paid makes the assignor a surety; but he is not discharged merely by the assignee taking a new mortgage for the same debt on the same land from a purchaser thereof from the mortgagor, with an extended time for payment, the assignee refusing at the same time to discharge the old mortgage; the new mortgage containing a redemise clause, but not being executed by the mortgagee.

Judgment of the Common Pleas Division, 27 O. R. 135, affirmed, OSLER, J. A., dissenting. *Trusts Corporation of Ontario* v. *Hood*, 589.

3. *Guarantee Bond—Non-disclosure.*]—An agent was engaged by the plaintiffs from year to year for four years to sell fruit on their behalf on commission, one of the terms of the engagement being that all moneys received by him on behalf of the plaintiffs should be paid in from day to day to their credit in a named bank. The agent made default in this respect, and a large balance was

due by him to the plaintiffs at the end of each of the first three years, and the plaintiffs at the end of each year took his note for the amount due, payable in the next year. In each year he gave a bond to the plaintiffs to secure the faithful performance of his duties and the prompt payment of moneys received. The defendants were the sureties in the bond given in the fourth and previous years, and entered into the contract of suretyship without making any enquiries from the plaintiffs. This action was brought against them to recover the balance due :—

Held, reversing the judgment of STREET, J., that the plaintiffs should have informed the sureties of the previous defaults, and not having done so could not enforce the bond. *Niagara District Fruit Growers Stock Company* v. *Walker*, 681.

See MORTGAGE, 2.

PRIVILEGE.

See DEFAMATION, 1.

PROBATE.

See EVIDENCE, 2.

PUBLIC HEALTH ACT.

R. S. O. ch. 205, sec. 84—Person Suffering from Infectious Disease—Failure of Board of Health to Isolate—Consequent Spread of Disease.]—The directions of section 84 of the Public Health Act, R. S. O. ch. 205, are imperative.

Where, instead of acting as directed in that section, by isolating and taking care of a person suffering from an infectious disease, the members of a local board of health send him into an adjoining municipality, they are personally liable to repay to that municipality moneys reasonably expended in caring for him and preventing the spread of the disease.

Judgment of ROBERTSON, J., affirmed, HAGARTY, C. J. O., dissenting. *Township of Logan* v. *Hurlburt*, 628.

PUBLIC PARKS ACT.

See MUNICIPAL CORPORATIONS, 3.

PUBLIC SCHOOLS.

See PRINCIPAL AND SURETY, 1.

QUEEN'S COUNSEL.

See CONSTITUTIONAL LAW.

RAILWAYS.

Negligence — Release — Reduced Rate—51 Vict. ch. 29, sec. 246 (D.) —Findings of Jury—New Trial.]—A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the allowance of a reduced rate of freight not to hold the company liable.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, followed.

Where the jury find negligence and then define the negligence to consist in doing certain acts, the Court, if there is some evidence of negligence in other respects, may in their discretion order a new trial,

although there is no evidence to support the specific findings.

Judgment of the Common Pleas Division, 26 O. R. 732, affirmed.

See MUNICIPAL CORPORATIONS, 2.

REGISTRY ACT.

See Pierce v. *Canada Permanent Loan and Savings Company*, 516.

RELEASE.

See RAILWAYS.

REPAIRS.

See LANDLORD AND TENANT, 2.

RESTRAINT OF TRADE.

See COVENANT.

RIVERS AND STREAMS ACT.

See WATER AND WATERCOURSES.

SALE OF GOODS.

See PRINCIPAL AND AGENT, 2.

SALE OF LAND.

See EASEMENT.

SCHOOLS.

See PRINCIPAL AND SURETY, 1.

SET-OFF.

See BANKRUPTCY AND INSOLVENCY, 3.

SHARES.

See COMPANY, 2.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 1.

SLANDER.

See DEFAMATION, 1.

STATUTES.

R. S. C. ch. 129.]—*See* COMPANY, 3.

R. S. O. ch. 53, sec. 29.]—*See* ARBITRATION AND AWARD.

R. S. O. ch. 61.]—*See* EVIDENCE, 1.

R. S. O. ch. 65.]—*See* COLLATERAL SECURITY.

R. S. O. ch. 106.]—*See* LANDLORD AND TENANT, 2.

R. S. O. ch. 118.]—*See* WATER AND WATERCOURSES.

R. S. O. ch. 120, sec. 20.]—*See* WATER AND WATERCOURSES.

R. S. O. ch. 122.]—*See* CHOSE IN ACTION, 2.

R. S. O. ch. 124, sec. 3.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

R. S. O. ch. 124, sec. 7.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. ch. 124, sec. 8.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

R. S. O. ch 132, sec. 5.]—*See* HUSBAND AND WIFE.

R. S. O. ch. 134, sec. 6.]—*See* INFANT.

R. S. O. ch. 143, sec. 28, sub-sec. 3.]—*See* LANDLORD AND TENANT, 4.

R. S. O. ch. 157, sec. 52.]—*See* COMPANY, 2.

R. S. O. ch. 157, sec. 61.]—*See* COMPANY, 3.

R. S. O. ch. 190.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 205, sec. 84.]—*See* PUBLIC HEALTH ACT.

51 Vict. ch. 29, sec. 246 (D.).]—*See* RAILWAYS.

55 Vict. ch. 30, sec. 2, sub-sec. 1 (O.).]—*See* MASTER AND SERVANT, 1.

55 Vict. ch. 30, sec. 14 (O.).]—*See* MASTER AND SERVANT, 2.

55 Vict. ch. 42, sec. 623*b* (O.).]—*See* MUNICIPAL CORPORATIONS, 1.

55, 56 Vict. ch. 29, secs. 22, 23 (D.).]—*See* JUSTICE OF THE PEACE.

57 Vict. ch. 50, sec. 13 (O.).]—*See* MUNICIPAL CORPORATIONS, 4.

STATUTORY CONDITIONS.

See INSURANCE.

SUBMISSION.

See ARBITRATION AND AWARD, 2.

TAXES.

See ASSESSMENT AND TAXES.

TOLLS.

See Smith v. *Township of Ancaster*, 596.

TORONTO GAS COMPANY.

Reserve Fund — Plant Renewal Fund.]—The judgment of FERGUSON, J., 27 O. R. 9, was reversed on the ground that there being no admission in the stated case of any over-payment by the plaintiffs, they had no *locus standi*. *Johnston* v. *Consumers' Gas Company of Toronto*, 566.

See ASSESSMENT AND TAXES.

TRESPASS.

See MALICIOUS PROSECUTION.

TRIAL.

See DEFAMATION, 2.—RAILWAYS.

TRUST.

See CHURCH — PRINCIPAL AND AGENT.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE.

WATER AND WATERCOURSES.

Rivers and Streams Act—Mills and Mill Dams Act—R. S. O. ch. 118—R. S. O. ch. 120, sec. 20.]—It is only when improvements in a stream are made for the express purpose of facilitating the floating of saw logs, lumber and timber, that tolls can be charged for their use under the Rivers and Streams Act.

A mill-dam is not such an improvement, and the right of the lumber-

man, conferred by R. S. O. ch. 118, to float saw logs, lumber and timber over it is unaffected by that Act.

Judgment of DEAN, Co. J., affirmed. *In the Matter of the Dam and Slide on the Little Bob River*, 177.

WILL.

1. *Construction — "My Lawful Heirs"—Period of Ascertainment.*]—The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will.

Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to the residue.

Re Ford, Patten v. *Sparks*, 72 L. T. N. S. 5, applied.

Judgment of BOYD, C., 25 O. R. 652, reversed. *Thompson* v. *Smith*, 29.

2. *Construction— Executory Devise— Dower— Practice— Administration Judgment—Adding Parties.*]—A testator, after devising specifically described properties to each of his three sons, each devise being subject to charges in favour of named beneficiaries, proceeded as follows: "I will and bequeath that should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." One son, after the testator's death and after accepting the devise to him, died without lawful issue, leaving a widow:—

Held, per HAGARTY, C. J. O., and OSLER, J. A., that this clause took effect upon the son's death and gave an executory devise over.

Per BURTON, and MACLENNAN, JJ. A., that the clause was limited to death in the testator's lifetime.

In the result the judgment of ROBERTSON, J., who held that the clause was void as being repugnant to the previous devise, was affirmed:—

Held, also, *per* HAGARTY, C.J.O., and OSLER, J.A., that notwithstanding the executory devise the deceased son's widow was entitled to dower, BURTON and MACLENNAN, JJ.A., expressing no opinion on this point.

Per MACLENNAN, J.A. If a person is improperly made a party in the Master's office after judgment in administration proceedings, he is not limited to moving against the order making him a party, but may appeal from the report. *Cowan* v. *Allen*, 457.

3. *Construction — Ambiguity — Elliptical Sentence.*]—A testator, after declaring the will in question to be his last will and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real and personal my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

Held, that the intention to devise the estate to the wife might fairly be gathered from this language.

Judgment of MEREDITH, J., 27 O. R. 501, affirmed. *May* v. *Logie*, 785.

See EVIDENCE, 2.

WINDING-UP ACT.

See COMPANY, 3.

WORDS.

"*Creditor.*"—*See Gurofski* v *Harris*, 717.

"*My Lawful Heirs.*"—*See* WILL, 1.

"*Proprietary Interest.*"—*See* HUSBAND AND WIFE.

"*Superintendence.*"—*See* MASTER AND SERVANT.

"*Under or with the Assent of.*"—*See* LANDLORD AND TENANT, 4.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT.